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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 338

FRANK H. DOHANY, APPELLANT,

vs.

FRANK F. ROGERS, STATE HIGHWAY COMMISSIONER FOR THE STATE OF MICHIGAN, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

FILED AUGUST 22, 1929

(34,469)

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[fol. 1]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

In Equity. No. 3118

FRANK H. DOHANY, Plaintiff,

vs.

FRANK F. ROGERS, State Highway Commissioner for the State of Michigan; The Detroit, Grand Haven & Milwaukee Railway Company, a Michigan Corporation, and the H. W. Nelson Company, of Chicago, Illinois, a Foreign Corporation, Defendants

DOCKET ENTRIES

Dec.	3,	1928. Bill of Complaint filed.
"	"	" Chancery Subpœna issued.
"	"	" Copies of Subpœna made for service
"	4,	" Restraining Order and Order to Show Cause, Returnable Dec. 17, 1928, filed and entered. Tuttle, Simons, Moinet, Judges.
"	7,	" Chancery Subpœna returned served, filed.
"	"	" Marshal's return on service of Bill of Complaint—filed.
"	"	" Marshal's return on service of Restraining Order and Order to Show Cause—filed.
"	11,	" Marshal's return on Chancery Subpœna served on Fred W. Green, Governor, Dec. 4/28—filed.
"	"	" Marshal's return on Bill of Complaint served on Fred W. Green, Governor, Dec. 4/28, filed.
"	"	" Marshal's return on Restraining Order and Order to Show Cause, served on Fred W. Green, Governor of State of Michigan, December 4, 1928, filed.
"	13,	" Appearance of Frank F. Rogers by Wilber M. Brucker, Atty. General, Kit F. Clardy,

[fol. 2] Asst. Attorney General, filed.

Dec. 17, 1928. Hearing on Order to Show Cause continued to January 21, 1299. Simons, Judge.
Jan. 3, 1929. Answer of Frank F. Rogers, filed.
" 10, " Answer and Motion to Dismiss of D. G. H. & M. Ry. Co., & H. W. Nelson Co. filed. Hearing Jan. 21, 1929.
" 11, " Notice of hearing January 21, 1929, on Motion to Dismiss—filed.
" 21, " Hearing on Order to Show Cause and Motion to Dismiss, with leave to file briefs in ten days. Hickenlooper, Tuttle & Moinet, Judges.
June 25, " Opinion recommending that temporary restraining Orders be dissolved and Bill of Complaint dismissed—filed. Tuttle, J. & Moinet, J.
" " " Decree vacating Temporary Restraining Order and Dismissing Bill of Complaint entered.
July 24, " Assignment of Errors filed.
" " " Petition for Appeal filed.
" " " Order allowing Appeal filed and entered. Tuttle, J.
" " " Bond of Frank H. Dohany in $500.00 on Appeal filed.
" " " Citation issued returnable August 24, 1929.
Aug. 3, " Præcipe indicating the portions of the record to be incorporated into the transcript and notice thereof—filed.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed Dec. 3, 1928

To the Judges of the District Court of the United States for the Eastern District of Michigan, Southern Division:

Frank H. Dohany, a citizen of the State of Michigan, residing in the City of Detroit, and County of Wayne, brings this, his Bill of Complaint against Frank F. Rogers, State

Highway Commissioner for the State of Michigan; the Detroit, Grand Haven & Milwaukee Railway Company, a Michigan Corporation; and the H. W. Nelson Company, of Chicago, Illinois, a foreign corporation, and therefore Plaintiff says:

[fol. 4]

I

That Plaintiff, Frank H. Dohany, is, and for many years last past has been, the owner of a parcel of land, consisting of seventy-two acres, and situated in the Northeast Quarter of Section 31, Troy Township, Oakland County, Michigan.

II

That on the 6th day of April, A. D. 1928, he received through the mail the following notice with the following certificate attached, containing a correct description of the portions of said parcel of land proposed to be taken and utilized for general railway purposes:

"Notice of Hearing

In the Matter of Necessity of the Construction and Improvement of Project in Oakland County, Michigan

To all those who now possess, or claim to possess, any right, title, or interest in the property or properties hereinafter described:

This is to advise you and each of you that it is proposed to construct and improve and to complete the construction and improvement of the State Trunk Line Road known as U. S. No. 10, also known as Woodward Avenue, from the county line between Wayne and Oakland Counties, Michigan, to the city of Pontiac, Michigan, in accordance with the plans and specifications now on file in the office of the State Highway Department and the Secretary of State, and known as State Highway Department Project No. M-063.3, being the project authorized and declared necessary by Act No. 340, of the Public Acts of 1927 of the State of Mich-

[fol. 5] igan, and more particularly described in a certain written contract dated July 20, 1927, between the State of Michigan, and the Detroit, Grand Haven & Milwaukee Railway Company, on file in the office of the Secretary of State at Lansing, Michigan.

It appears that you possess an interest in the hereinafter described parcels of land which it is necessary to acquire in order to provide for the construction and improvement of the project.

You are hereby notified that I will be present at the office of E. B. Howarth, 106 Howarth Building, Royal Oak, Michigan, at 8 o'clock in the forenoon, Central Standard Time, Saturday, April 14, 1928, for the purpose of hearing objections to the necessity for the proposed construction and improvement and the necessity of taking those particular parcels of land therefor.

Frank F. Rogers, State Highway Commissioner in and for the State of Michigan.

Dated at Lansing, Michigan, this 5th day of April, A. D. 1928.

Property of Frank Dohany

A parcel of land in the West ½ of the N. E. ¼ of Section 31, T. 2 N. R. 11 E., Oakland County, Michigan, more particularly described as follows:

Beginning at a point on the West line of lands owned by Frank Dohany (which is also the East line of the Birmingham Gardens Subdivision)—said point being distant Southerly 815.3 feet from the North line of said Section 31; thence in a Southeasterly direction on a curve to the right having a radius of 22,961.83 feet through a central [fol. 6] angle of 3°-3′ a distance of 1,220.4 feet to a point on the Easterly North and south ⅛ line of said Section 31 which point is distant Northerly 151.8 feet from the S. E. corner of said Frank Dohany property, which is also the N. E. corner of the Sheffield Estates Subdivision No. 1; thence Southerly along the said Easterly North and South ⅛ line a distance of 151.8 feet to the said S. E. corner; thence Westerly along the South line of said Frank Dohany's property making a Northwesterly angle of 90°-04′ with said last described course a distance of 260.42 feet to a point; thence in a Northwesterly direction on a curve to the left having a radius of 22,661.83 feet through a central angle of 1°-54′-20″ a distance of 753.26 feet to a point on the West line of said Frank Dohany's property, which point is distant Southerly 1,358.3 feet from the North line of said Section 31; thence Northerly along the West line of

said Frank Dohany's property a distance of 543.0 feet to the point of beginning; containing an area of 7.250 acres more or less.

Property of Frank Dohany

No. 1. All that part of that parcel of land described as: Beginning at a point on the East and West ¼ line of said Section 31, which is distant Westerly 769.18 feet from the East line of said Section 31; thence extending Westerly along said East and West ¼ line a distance of 347.52 feet to a point which is distant Easterly 201.5 feet from the Easterly North and South ⅛ line of said Section; thence Northwesterly on a line which makes a Northwesterly angle of 59°-46′ with the said East and West ¼ line a distance of 360.4 feet to the beginning of a curve; thence continuing Northwesterly on a curve to the left having a radius of 22,661.83 feet through a central angle of 00°-07′ a distance [fol. 7] of 46.4 feet to a point on the said Easterly North and South ⅛ line which point is distant Northerly 351.2 feet from the East and West ¼ line of said Section; thence Northerly along the said Easterly North and South ⅛ line a distance of 595.6 feet to a point, which point is Northerly 151.8 feet from the N. E. corner of the Sheffield Estates No. 1 Subdivision; thence Southeasterly on a curve to the right having a radius of 22,961.83 feet through a central angle of 1°-24′-21″ a distance of 563.2 feet to a point of tangency; thence continuing Southeasterly on the tangent to the curve at said point a distance of 535.35 feet to the point of beginning; containing an area of 5.184 acres more or less, which lies within the North ½ of the Southeast ¼ of the Northeast ¼ of Section 31, Town. 2 North, Range 11 East, Oakland County, Michigan.

State of Michigan,
County of Ingham, ss:

I, Frank F. Rogers, State Highway Commissioner, do hereby certify that I have compared the foregoing copy with the original of record in my office, and that the same is a correct transcript therefrom, and the whole of such original.

In testimony whereof, I have hereunto set my hand at the City of Lansing, this 5th day of April, A. D. 1928.

Frank F. Rogers, State Highway Commissioner."

III

That a hearing was had on the 14th day of April, A. D. 1928, before said Frank F. Rogers at the hour and place set [fol. 8] forth in said Notice, at which time testimony was taken, from which the following facts were disclosed:

(a) that said Frank F. Rogers, State Highway Commissioner, was seeking to acquire a right-of-way for said Detroit, Grand Haven & Milwaukee Railway Company for its use, and also for yards, side-tracks and switches, and all in conformity with the terms of a certain contract entered into between the State of Michigan and the said Detroit, Grand Haven & Milwaukee Railway Company, said contract being set forth and included as a part of Act No. 340, of the Public Acts of 1927, of the State of Michigan, a true copy of said contract being hereto attached and marked Exhibit "A";

(b) that said property sought to be acquired was over three-fourths of a mile East of Woodward Avenue, known as State Trunk Line U. S. No. 10, and that it was being obtained for the purpose of making a trade with the said Detroit, Grand Haven & Milwaukee Railway Company for its present right-of-way along the Easterly side of said Woodward Avenue;

(c) that the proceedings were being conducted in conformity with the so-called "Highway Condemnation Act," being Act No. 352 of the Public Acts of 1925, as amended by Act No. 92, of the Public Acts of 1927 of the State of Michigan, and by authority of Act No. 215 of the Public Acts of 1925 of the State of Michigan, which said "Highway Condemnation Act" permits the allowance and awarding of damages to the owner only for land actually taken for highway purposes, and does not authorize the allowance of any consequential damages, or damages for a diminution of the value of the remainder of the tract of land from which said land for right of way is taken;

[fol. 9] (d) that the tracks, side-tracks and yards of said Detroit, Grand Haven & Milwaukee Railway Company, consisting of approximately twelve tracks, would cross the Westerly portion of the land of this Plaintiff at an acute angle, and at an average elevation of approximately ten

feet above the ground level; that said tracks and yards would extend at said elevation for a distance of four thousand feet in a Southeasterly direction from Maple Avenue to Clawson Road; which public highways are the Northerly and Southerly boundaries of said Section 31, and continuing beyond the Southerly end of said proposed yard, said elevated main line roadbed would extend at a much greater elevation to and beyond Clawson Road; that the Plaintiff's property, which is in the Northeast quarter of said Section of land, would be entirely shut off from approach to Woodward Avenue, and to the Village of Birmingham by said elevated yards and main line roadbed, except by going in a roundabout way over either said Maple Avenue or said Clawson Road;

(e) that in the breaking up and making up of drags and trains in said yard, and also in the passing of trains on the main line tracks, there would be continuously a large volume of smoke, cinders, dust, steam, et cetera, produced by and emitted from the locomotives and trains, and also that there would be continuous vibration, noise and other damaging features to the surrounding territory;

IV

That on the 20th day of April, A. D. 1928, this Plaintiff received through the mail from the Defendant, Frank F. Rogers, State Highway Commissioner, the following document:

[fol. 10] "Determination of Necessity and of the Damages to be Paid as Compensation for the Taking of Private Property for Public Highway Purposes

State Highway Project No. M-063-3

I, Frank F. Rogers, State Highway Commissioner in and for the State of Michigan, by virtue of the authority vested in me by law; and after a hearing on the matters herein mentioned, held in the office of E. B. Howarth, in the Howarth Building, in the City of Royal Oak, Michigan, and adjourned to the City Hall in said City by mutual agreement of all present, on April 14, 1928, of which hearing, in accordance with the statutory provisions made and provided,

notice was given of the time and place thereof to all persons interested, so far as known, in the property hereinafter described, desired for the purpose herein specified, at least seven (7) days before the time of said hearing, as appears by proofs of service of said notice on each of said persons, on file in my office in the City of Lansing, Michigan, all in the manner prescribed by law; and after hearing all persons present; and after due consideration thereof; and being fully advised in the premises, do hereby determine—

1. That it is necessary to construct and improve, and to complete the construction and improvement of the public highway known as U. S. Road No. 10, also known as Woodward Avenue, from the county line between Wayne and Oakland Counties, Michigan, to the City of Pontiac, in accordance with plans and specifications therefor on file in my office in the City of Lansing, Michigan, designated as State Highway Department Project No. M-063-3.

[fol. 11] 2. That it is necessary to acquire for such public highway purpose the fee simple title in and to the several parcels of land hereinafter specifically described, for the purchase of which I hereby declare that I have been unable to agree with the owners and persons otherwise interested therein, said land being desired by me, as such State Highway Commissioner, and by the State of Michigan, to exchange for other property which I hereby determine it is necessary to acquire for said public highway purpose, to-wit: The present railway right of way of the Detroit, Grand Haven & Milwaukee Railway Company from its Milepost No. 13 in the City of Royal Oak, Michigan, to its Milepost No. 22.1 in Bloomfield Township, all in Oakland County, Michigan, in accordance with a certain written contract, providing for such exchange, between the State of Michigan and said Detroit, Grand Haven & Milwaukee Railway Company, dated July 20, 1927, and Act No. 340 of the Public Acts of 1927 of the State of Michigan.

3. That the description of each of said parcels of land to be acquired for said public highway purpose, as aforesaid, the damages which, in my opinion, should be paid as compensation for the taking of each parcel of such property,

after deducting the benefits accruing to the owners of each of said parcels of land by reason of the improvement, as hereinafter indicated, and the name of each person interested in each such parcel, so far as known, are as follows:

Group "K"

Property of Frank H. Dohany

A parcel of land in the West ½ of the N. E. ¼ of Section 31, T. 2 N. R. 11 E., Oakland County, Michigan, more particularly described as follows:

[fol. 12] Beginning at a point on the West line of lands owned by Frank Dohany which is also the East line of the Birmingham Gardens Subdivision, said point being distant Southerly 815.3 feet from the North line of said Section 31; thence in a Southeasterly direction on a curve to the right having a radius of 22,961.83 feet through a central angle of three degrees, three minutes, a distance of 1220.4 feet to a point on the Easterly North and South ⅛ line of said Section 31, which point is distant Northerly 151.8 feet from the S. E. corner of said Frank Dohany's property which is also the N. E. corner of the Sheffield Estates Subdivision No. 1; thence Southerly along the said Easterly North and South ⅛ line a distance of 151.8 feet to the said S. E. corner; thence Westerly along the South line of said Frank Dohany's property making a Northwesterly angle of 90 degrees four minutes with said last described course a distance of 260.42 feet to a point; thence in a Northwesterly direction on a curve to the left having a radius of 22,661.83 feet through a central angle of one degree, fifty-four minutes, twenty seconds, a distance of 753.26 feet to a point on the West line of said Frank Dohany's property, which point is distant Southerly 1,358.3 feet from the North line of said Section 31; thence Northerly along the West line of said Frank Dohany's property a distance of 543.0 feet to the point of beginning; containing an area of 7.250 acres more or less.

Owner: Frank H. Dohany.

Damages: $23,562.50.

Property of Frank H. Dohany

No. 1. All that part of that parcel of land described as follows:

Beginning at a point on the East and West ¼ line of said Section 31, which is distant Westerly 769.18 feet from the [fol. 13] East line of said Section 31; thence extending Westerly along said East and West ¼ line a distance of 347.52 feet to a point which is distant Easterly 201.5 feet from the Easterly North and South ⅛ line of said Section; thence Northwesterly on a line which makes a Northwesterly angle of 59 degrees, 46 minutes with the said East and West ¼ line a distance of 360.4 feet to the beginning of a curve; thence continuing Northwesterly on a curve to the left having a radius of 22,661.83 feet through a central angle of 00 degrees, 07 minutes, a distance of 46.4 feet to a point on the said Easterly North and South ⅛ line which point is distant Northerly 351.2 feet from the East and West ¼ line of said section; thence Northerly along the said Easterly North and South ⅛ line a distance of 595.6 feet to a point, which point is Northerly 151.8 feet from the N. E. corner of the Sheffield Estates No. 1 Subdivision; thence Southeasterly on a curve to the right having a radius of 22,961.83 feet through a central angle of one degree, twenty-four minutes, twenty-one seconds, a distance of 563.2 feet to a point of tangency; thence continuing Southeasterly on the tangent to the curve at said point a distance of 535.35 feet to the point of beginning; containing an area of 5.184 acres more or less, which lies within the North ½ of the Southeast ¼ of the Northeast ¼ of Section 31, Town 2 North, Range 11 East, Oakland County, Michigan, containing about .35 acres.

Owner: Frank H. Dohany.

Damages: $1,137.50.

In witness whereof I have hereunto set my hand this 19th day of April, A. D. 1928.

(Sgd.) Frank F. Rogers, State Highway Commissioner of the State of Michigan."

[fol. 14] V

That said Highway Commissioner allowed this Plaintiff the sum of $3,250.00 per acre for the 7.60 acres of land

actually taken, but in keeping with the terms of said Act No. 352, of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, refused to award Plaintiff any consequential damages, or damages for depreciation in the value of the remainder of the tract from which said land was being taken.

VI

Plaintiff avers that in conformity with the provisions of Sections 5 and 6 of said Act, said Frank F. Rogers, State Highway Commissioner, has taken possession of, and claims title to said 7.60 acres of land, and together with the said Detroit, Grand Haven & Milwaukee Railway Company has entered into contract with the Defendant, H. W. Nelson Company of Chicago, Illinois, for the construction of said Railway and Railway yards and grading roadbed, tracks, et cetera; that said Defendants have already taken control and possession of said property, and have cut standing timber thereon, and have begun grading and building tracks and trestles thereon, all without having made any award or offer of consequential damages, or damages for diminution of value to the remainder of said tract of land.

VII

That your Plaintiff acquired said tract of land approximately fourteen years ago, with a view of retaining the same until the time would arrive when said property would become of value for residential subdivision purposes through the growth and development of the Cities of Detroit and Royal Oak, and the Village of Birmingham; that [fol. 15] he never received one cent of income from said property since he acquired it, but on the contrary has expended many thousands of dollars for taxes and improvements; that practically all of the surrounding and adjoining property has been platted, and lots sold under restrictions for residential purposes, many high class residences having been constructed on lands adjoining your Plaintiff's, and this Plaintiff has intended to so plat and sell his property for the same purposes in the immediate future, but that such residential utility would be wholly destroyed by the construction of said main line tracks and railroad yards through said premises, and its value would be di-

minished to the extent of one hundred thousand dollars ($100,000.00) and upwards.

VIII

That said Act No. 340, Public Acts of 1927, authorizes and empowers Defendant, Frank F. Rogers, to acquire the lands described in said contract for said new right of way on behalf of the State of Michigan by purchase or condemnation, in accordance with the general laws of the State of Michigan, and Defendant, Frank F. Rogers, assuming that Act 215 of the Public Acts of 1925 authorizes him to proceed under either the "Rail way Condemnation Act" so-called, or the "Highway Condemnation Act" so-called, has chosen to proceed under the "Highway Condemnation Act"; that Act 215, Public Acts of 1925, contravenes both the due process of law and the equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States and is therefore unconstitutional; that Act 215, Public Acts of 1925, arbitrarily and capriciously places the Plaintiff in a discriminate class, and deprives him of the priv-
[fol. 16] ileges, rights and immunities preserved to and enjoyed by others under like circumstances and conditions and similarly situated, and would permit the State Highway Commissioner, in this instance, Defendant, Frank F. Rogers, to ultimately acquire for the Defendant, Detroit, Grand Haven & Milwaukee Railway Company, a right of way through Plaintiff's lands, without incurring liability to Plaintiff for consequential damages to the portion of his tract not taken, and other liabilities under the common law and said "Railway Condemnation Act."

IX

That on the 4th day of October, 1928, said Defendant, Frank F. Rogers, pursuant to the provisions of Section 7 of said Act No. 352, Public Acts of 1925, as amended by Act No. 92, Public Acts of 1927, filed a petition with the Probate Court for the County of Oakland, stating that he deemed it necessary to take the fee of said property, and praying for the appointment of three Court Commissioners to appraise the damages to be paid as compensation

for the taking of said 7,600 acres of land; that upon the filing of said petition, and pursuant to the provisions of Section 8 of said Act, the Probate Court for the County of Oakland made an order fixing December 5th, 1928, at 10 o'clock A. M., as the day for the hearing on such petition; that a copy of said petition and order are hereto attached, and marked Exhibit "B."

X

That it has been the contention of the Defendant, Frank F. Rogers, State Highway Commissioner, from the outset, that this Plaintiff was not entitled to any consequential [fol. 17] damages, for the reason that said Statute allowed damages only for the value of land actually taken. That at no time have there been any negotiations between said Defendant and this Plaintiff, looking to the payment of consequential damages for a diminution of value to the remainder of the tract from which 7,600 acres is to be taken. That under the provisions of said Statute, it will be without and beyond the power and duty of said Commissioners to be appointed on the 5th day of December, 1928, by the Probate Court of Oakland County, to award this Plaintiff any consequential damages, which he would otherwise be entitled to if said lands were being taken by any other railroad company in the State of Michigan for railway purposes.

XI

That the general railroad condemnation statutes in Michigan, herein otherwise referred to as the "Railway Condemnation Act," regulating the procedure and determining the tribunal with jurisdiction to hear allegations and proofs, and determine necessity and award damages, in railway condemnation cases, are the following Sections of the Compiled Laws of Michigan, 1915, with the material substance of each:

(a) Section (8249) provides that whenever any lands are condemned to the public use, by any railroad, under the provisions of the Act, such company shall pay to the owners and others interested in the lands condemned, in addition to the damages and compensation awarded by the jury,

a reasonable attorney fee to be fixed and determined by the court, and when the report or verdict is confirmed and the attorney fee so allowed, together with witness fees and other costs and expenses to be taxed in civil actions, shall be paid, tendered or deposited, with the damages or com- [fol. 18] pensations as otherwise provided, before such company shall have any right to enter upon or take possession of the lands condemned.

(b) Section (8250) provides that for the purpose of acquiring title to such lands such company may present a petition to any court of record for the county praying for the appointment of three commissioners.

(c) Section (8254) provides that the land owner shall have the right of trial by a jury of twelve freeholders of the county in which the lands are situated, to ascertain and determine the necessity for taking such land and to appraise and determine the damages or compensation to be allowed therefor;

(d) And further provides that the court shall direct the Sheriff or any Constable of the County to make a list in writing of 24 inhabitants of the county qualified to serve as jurors in the courts of record of this State. Such Sheriff or officer shall, before he proceeds to make such list, be sworn by the court or the judge to select such persons according to his best judgment and without favor or partiality to either party;

(e) And further provides that a jury shall be struck by the petitioner striking off six names and the respondent striking off six names;

(f) And further provides that both the petitioner and the respondents may exercise the right of challenge for cause;

(g) And further provides that the demand of any one of the respondents for a jury shall be deemed to be a demand for all.

(h) Section (8255) provides that the jury shall proceed to ascertain and determine the necessity of taking and using any said real estate or property for the purposes pro-

posed, and if they deem the same to be necessary, to ascer-
[fol. 19] tain and determine the damages and compensation which ought justly to be made by said company to the owner.

(i) Section (8257) provides that after filing of the court's recital order with the Register of Deeds of the County and the payment or deposit by the railroad company of a sum to be paid as compensation and for costs, expenses and counsel fees, the railroad company shall be entitled to enter upon and take possession of the owner's lands and other property, and all persons who have been made parties to the proceedings by publication or otherwise shall be barred of all right, estate and interest in such real estate;

(j) And further provides that within twenty days after the confirmation of the report of the commissioners or jury as above provided for, either party to the proceedings may appeal, by notice in writing to the other to the Supreme Court from the appraisal or report of the jury; that such notice shall specify the objections to the proceedings had in premises and the Supreme Court shall pass on such objections, and on the hearing of such appeal the Supreme Court may direct a new appraisal before the same or new jurors in its discretion, the second report of the jury to be final and conclusive upon all parties in interest.

And that the continuation of the aforesaid proceedings by Defendant, Frank F. Rogers, in the Probate Court of Oakland County under said "Highway Condemnation Act", if permitted, will deprive Plaintiff of all the advantages, immunities, privileges and vested rights that would otherwise be afforded Plaintiff by the foregoing provisions of the "Railway Condemnation Act" had such proceeding been brought under it, and that Plaintiff also would be deprived of the benefits of the common law applicable to the measure of damages in such proceeding.

[fol. 20] XII

That Defendant, Frank F. Rogers, by virtue of his written determination of necessity, made on April 20th, 1928, aforesaid, and by reason of his having caused such writ-

ten determination to be filed in the office of the State Highway Commissioner, and a certified copy thereof recorded in the office of the Register of Deeds of Oakland County, and by reason of his having heretofore deposited with the State Treasurer the aforesaid amounts of money, by the terms of said written determination awarded this Plaintiff, now pretends that the title to, and the right of possession and occupancy of, all the property and property rights described in such determination, previously belong to the Plaintiff, have vested in the State of Michigan; and Plaintiff represents that the said Frank F. Rogers, on behalf of the State of Michigan, has turned over the right of possession and occupancy of said property to Defendant, Detroit, Grand Haven & Milwaukee Railway Company, and the said Railway Company, by virtue of the terms of its construction contract with the Defendant, H. W. Nelson Company, has authorized said Company to occupy said land for the purpose of completing the construction of said railway yards, main line tracks and other railway construction work upon said property, and that Plaintiff has ever since been divested of his right of possession and occupancy of said property.

XIII

That Section 4, of Act No. 340, of the Public Acts of 1927, which declares the changes and improvements contemplated by said Act and the proposed contract, and the taking of the lands described in said contract for the new right-of-way of said Railway Company including the [fol. 21] additional lands described therein necessary for depot and yard purposes at Birmingham, and all other lands necessary to carry out said Act and the proposed contract, to be a public necessity, is in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the Plaintiff of the Constitutional guaranty of due process of law, and the equal protection of the laws, thereby depriving this Plaintiff of his right to a determination of said question of necessity by a jury in a court of record as provided by the "Railway Condemnation Act," which is the general law applicable in this State, and because it denies the Plaintiff the protection of his day in court and free access to the tribunal

designated by the general laws, and that the provisions of said Section constitute an arbitrary and capricious classification of the Plaintiff and others owning land through which it is proposed to project the right-of-way of said Railway Company.

XIV

That said Railway Company is granted a special immunity from the payment of consequential damages for the diminution of value of the remainder of the tracts from which its right-of-way is taken, and which immunity is not enjoyed by other railroads in the State of Michigan, contrary to the provisions of the 14th Amendment of the Constitution of the United States of America, and for which reason both said Act No. 340, Public Acts of 1927, and Act No. 352, Public Acts of 1925, as amended by Act No. 92, Public Acts of 1927, are void.

XV

Because the proceedings being taken by said Defendants to procure a railway right of way under the provisions of [fol. 22] both of said Acts are a denial to this Plaintiff, as well as to other railroad companies within the State of Michigan, of the equal protection of the laws, in contravention of said 14th Amendment of our Federal Constitution.

XVI

That Plaintiff is informed and believes, and therefore charges the fact to be, that the conduct of the Defendant, Frank F. Rogers, in pursuance of said Act No. 340, Public Acts of 1927, and said Act No. 352, Public Acts of 1925, as amended by Act No. 92, Public Acts of 1927, offend the Constitution of the State of Michigan, for the following reasons:

(a) Because Article 13, Section 1, of the Michigan Constitution provides, that private property shall not be taken by the public, nor by any corporation for public use, without just compensation therefor being first made or secured in such manner as shall be prescribed by law. That just compensation includes consequential damages, and which are not provided for in said Acts.

(b) Because Article 2, Section 16, of our Michigan Constitution provides, that no person shall be deprived of property, without due process of law. That the taking of Plaintiff's property without even making any offer or award of consequential damages for a decrease in the value of the remainder of the tract, contravenes this provision.

(c) Because Article 1, Section 2, of our Michigan Constitution provides that Government is instituted for the equal benefit, security and protection of the People. That said provision is violated for the reason that Plaintiff will be denied the equal protection of the laws, and his property [fol. 23] will be taken without due process of law.

(d) Because Article 2, Section 13, of our Michigan Constitution, provides, that the right of trial by jury shall remain. That the use of said Highway Condemnation Law by the State Highway Commissioner, to acquire a right of way for a railroad company, will deprive Plaintiff of a jury to pass upon his measure of damages, contrary to the provisions of said section.

(e) Because it was not the intention of the framers of our Michigan Constitution, that Article 13, Section 2, would be used for the purpose of authorizing the Legislature of the State of Michigan to pass an act whereby a "Highway Condemnation Law" could be used as a "Railway Condemnation Law," and thereby depriving a land owner, whose property was being taken, of his right to trial by jury, and also of consequential damages as just compensation. For this reason, said Statutes also contravene Article 13, Section 2.

(f) Because Article 5, Section 21, of our Michigan Constitution, provides that no law shall embrace more than one object, which shall be expressed in its title. The title of Act No. 340, Public Acts of 1927, doesn't indicate that said Act authorizes the State to acquire a right of way for the Railway Company, etc., but only that it may enter into an agreement to so acquire. So far as authority to condemn is concerned, the title indicates that the Act only authorizes condemnation for acquiring a seventy foot highway on either side of the relocated tracks. For this reason, the title is too narrow, and offends the Article and Section herein quoted.

[fol. 24] XVII

That the changes and improvements contemplated by said Act No. 340, Public Acts of 1927, and said contract embraced in said Act, and the taking of the lands described in said contract for the new right of way for said Railway Company, including the additional lands described therein, and claimed to be needed for depot and yard purposes at Birmingham, Michigan, and all other lands claimed to be needed or required to carry out said Act and said Contract, are not a public necessity; that the surrender of the railway franchise now owned by Defendant, Detroit, Grand Haven & Milwaukee Railway Company, referred to in said Contract, is not a public necessity; that the taking of 9.10 miles of the right of way now owned and occupied for steam railway purposes by the Defendant, Detroit, Grand Haven & Milwaukee Railway Company, to be utilized to widen the roadbed of said Woodward Avenue is not a public necessity, because sufficient area for that purpose may be obtained by the State of Michigan from the owners of the lands adjacent to and bordering the Westerly line of said Woodward Avenue for less than one-half of what would be the cost of the new proposed right of way sought to be taken by said condemnation proceedings, and that the widening of Woodward Avenue, and the securing of said new right of way for Defendant, Detroit, Grand Haven & Milwaukee Railway Company, is not one project but consists of two or more projects wholly unrelated to each other.

XVIII

That Section 1 of Act No. 340, of the Public Acts of 1927, contains the following provision:

[fol. 25] The Governor of the State of Michigan is hereby authorized and empowered * * * to acquire, or cause to be acquired, by the State Highway Commissioner, a new right of way for said Railway Company approximately nine and one-tenth miles in length, in Oakland County, Michigan.

That Section 10 of said Act contains the said contract entered into by the State and the Railway Company, a copy of which is hereto attached and marked Exhibit "A,"

in which the State agreed to "proceed with all convenient speed to procure, or cause to be procured, a new right of way one hundred feet wide for said Railway Company for the purpose of constructing thereon a new double-track railroad as and where provided in this contract, etc."; that Plaintiff is uncertain as to whether the State of Michigan contends that in the said condemnation proceeding now pending as aforesaid, it is, by virtue of said Act 340, and the said contract therein contained, acting as the agent of said Railway Company, or for the purposes of the instant case, by virtue of said Act, it has withdrawn from the said Railway Company, with its consent, the power to exercise the right of eminent domain, and is itself now exercising that right as though it had never been granted by general statute; that regardless of which construction is put upon the legal import of said Act, the status of the Plaintiff as to his vested rights would be completely changed were he deprived of the protection afforded him by the provisions of the "Railway Condemnation Act," the general law of the State; that Sections 1 and 10 of said Act 340, Public Acts of 1927 are in contravention of the Fourteenth Amendment to the Constitution of the United States, because each [fol. 26] grants to said Railway Company a special immunity from liabilities, not afforded any other railway company under like circumstances and conditions, and deprives Plaintiff of equal immunities, privileges and vested rights afforded all other owners of real estate under like circumstances and conditions when similar proceedings are instituted by other railway companies under the "Railway Condemnation Act," and therefore denies the Plaintiff the equal protection of the laws and deprives Plaintiff of his property without due process of the law.

XX

That because of the invalidity of Sections 1 and 10 of Act 340, of the Public Acts of 1927, or either of them, the whole of said Act has lost its vitality as a Legislative Act, and is unconstitutional, and invalid in its entirety, and that therefore the Probate Court of the County of Oakland is without jurisdiction to grant the prayer of the the said petition of the Defendant, Frank F. Rogers, filed in said court on October 4th, 1928, or to entertain any proceedings thereunder.

XXI

That said Act No. 352, Public Acts of 1925, as amended by Act No. 92, Public Acts of 1927, is being utilized by Defendant, Frank F. Rogers, in said condemnation proceedings on the theory that the acquiring of the present right of way of the Defendant, Railway Company, for highway purposes, and the condemning of Plaintiff's said lands for Railway utility, constitute one project under the provisions of Act No. 340, Public Acts of 1927; that if said theory is the law of the State of Michigan, said Act No. 352, Public [fol. 27] Acts of 1925, as amended by Act No. 92, Public Acts of 1927, contravenes the provisions of the Fourteenth Amendment to the Constitution of the United States, in that it deprives Plaintiff of his property without due process of the law, and denies Plaintiff the equal protection of the laws, and is void.

XXII

And that Defendant, Frank F. Rogers, threatens, and this Plaintiff fears that he will carry his threats into execution, to urge a hearing upon his said petition in said condemnation cause now pending in the Probate Court of the County of Oakland, Calendar No. 23,548, on Wednesday, December 5th, 1928, and impress the Court to grant the prayer of said petition, and by the court's order appoint three court commissioners to proceed to view said premises described in said petition and hear the proofs and allegations of the parties and appraise the damages to be paid as compensation to Plaintiff for the portion of his property taken without making any appraisal and award to Plaintiff for consequential damages to the remainder of his tract, and he, said Frank F. Rogers, threatens to continue the prosecution of said proceedings until the entry of the final order of the court confirming such report of said commissioners, thereby causing this Plaintiff to suffer immediate and irreparable loss and damages in excess of One Hundred Thousand Dollars ($100,000), and that Defendant, Frank F. Rogers, ought to be restrained by the injunction of this Honorable Court from urging a hearing upon his said petition in the Probate Court of the County of Oakland, Michigan, on Wednesday, December 5th, 1928, and at any time thereafter and from impressing

the court to grant the prayer of said petition, and by its [fol. 28] order, appoint three commissioners as therein prayed, and to desist and refrain from prosecuting said condemnation proceedings before said court or its commissioners until the further order of this court, and that upon the hearing of this cause said injunction be made permanent.

Inasmuch, therefore, as Plaintiff is without relief, except in a court of equity, he prays:

That the said Detroit, Grand Haven & Milwaukee Railway Company, a Michigan Corporation, H. W. Nelson Company, a foreign corporation, and Frank F. Rogers, State Highway Commissioner for the State of Michigan, be made Defendants herein, and be required to answer the allegations of this Bill of Complaint, paragraph by paragraph, but not under oath, their answers under oath being hereby waived, and that process issue accordingly.

That the said Detroit, Grand Haven & Milwaukee Railway Company, a Michigan Corporation, H. W. Nelson Company, a foreign corporation, Frank F. Rogers, State Highway Commissioner for the State of Michigan, their agents, attorneys, counsellors, servants and employes and, each of them, be restrained by the order of this Court from proceeding with the construction of a right of way across and over the property of this Plaintiff, and from doing any work of any kind, nature or description in connection therewith, and that they be directed by the decree of this Court forthwith to remove from the property owned by this Plaintiff all tools, appliances and apparatus used for the construction of said right of way and said railway system.

That pending the hearing of this cause a temporary injunction may be issued out of, and under the seal of, this [fol. 29] Honorable Court, directed to the said Frank F. Rogers, State Highway Commissioner, restraining him from urging a hearing upon his said petition in the Probate Court of the County of Oakland, Michigan, on Wednesday, December 5th, 1928, and at any other time thereafter, and from impressing the court to grant the prayer of said petition and by its order appoint three commissioners as therein prayed, and to desist and refrain from prosecuting

said condemnation proceedings before said court, or its commissioners, until the further order of this Court.

That pending the hearing of this cause a temporary injunction may be issued out of and under the seal of this Court, directed to the said Defendant, Detroit, Grand Haven & Milwaukee Railway Company, a Michigan Corporation, and to the Defendant, H. W. Nelson Company, a foreign corporation, and to Defendant, Frank F. Rogers, State Highway Commissioner for the State of Michigan, restraining them and each of them from proceeding with the construction of said railway right of way, and a steam railroad and railroad yards thereon or any appurtenances thereto, and that upon the hearing of this cause said injunction be made permanent.

That Plaintiff may have such other, further and additional relief in the premises as shall be agreeable to equity and good conscience, and to this Court shall seem meet.

(Sgd.) Frank H. Dohany. Dohany & Dohany, Attorneys for Plaintiff, 1021-1025 Hammond Bldg., Detroit, Michigan.

[fol. 30] *Duly sworn to by Frank H. Dohany. Jurat omitted in printing.*

EXHIBIT "A" TO BILL OF COMPLAINT

This contract and agreement, made and entered into by and between the Detroit, Grand Haven and Milwaukee Railway Company, party of the first part, hereinafter called the "Railway Company," and the State of Michigan, party of the second part, hereinafter referred to as the "State," witnesseth, as follows:

Whereas the Detroit, Grand Haven & Milwaukee Railway Company is a corpoartion organized and existing under and by virtue of a special charter granted by the territorial council of the territory of Michigan, March seven, eighteen hundred thirty-four, and acts amendatory thereof and supplementary thereto, under which said statutory special charter said railway company pays annually a fixed [fol. 31] percentage of its capital stock paid in as taxes to the state, and at the present time is paying annually

twenty-five thousand one hundred seventy-one dollars and forty cents ($25,171.40); and

Whereas the validity of said special charter of said railway company has been attacked from time to time by the state, in the courts of this state, and the validity of said special charter has been upheld by the Supreme Court of this state, and the Supreme Court of the United States; and

Whereas the State of Michigan has for many years sought to procure the surrender of all of the special charters of all of the railroad companies in the State of Michgan, and to have said railroad companies incorporate under the general laws of the State of Michigan providing for the organization and incorporation of railroad companies and to pay the same rate of taxes to the state upon the true cash value of their taxable property, but that the said railway company has refused to surrender its special charter and to incorporate under the general railroad law, and to pay taxes upon the value of its taxable property in accordance with the general law of said state providing for the taxation of the property of railroad companies; and

Whereas the State is desirous of acquiring the right of way of said railway company extending from the railway company's mile post number thirteen in Royal Oak to the railway company's mile post number twenty-two and one-tenth between Pontiac and Birmingham, for the purpose of enabling the state to carry out its highway program, and to widen to two hundred feet the right of way of the public highway running substantially parallel to said right of way of said railway company, and known as Woodward [fol. 32] Avenue, and to have said railway company remove its tracks and equipment from said right of way; and

Whereas said railway company executed in its own behalf by its president, attested by its secretary, a contract, which said contract was submitted to the legislature of the State of Michigan for its ratification and approval, at the extra session of the legislature conveyed in nineteen hundred twenty-six; and

Whereas the legislature of the state, by act number one, of the public acts of the extra session of nineteen hundred twenty-six, approved in all respects said contract, and authorized the governor and the state highway commissioner

to execute the same upon the part of the State of Michigan, attested by the Secretary of State; and

Whereas after said contract was so executed on behalf of the said railway company and submitted to the legislature of the state and approved by it, and the governor and the state highway commissioner were authorized to execute the same on behalf of said state, to be attested by the secretary of state, said contract was materially changed from the terms of the contract executed by said railway company and submitted to the legislature of the state; and

Whereas the plans and specifications attached to the contract executed on behalf of said railway company and on behalf of the state on September two, nineteen hundred twenty-six, were altered and amended subsequent to the passage by the legislature of the state and the approval by the governor, of act number one, of the public acts of the extra session of nineteen hundred twenty-six, and that by reason of the changes made in material parts of said contract after the approval of the same by the legislature [fol. 33] by act number one of the public acts of the extra session of nineteen hundred twenty-six, said contract is claimed by the State of Michigan to be of doubtful validity, although the railway company does not admit any such invalidity, said amendments, additions and alterations made in and to said contract not having been ratified by the legislature of the state, and both parties to said contract desiring to obviate, as far as possible, any question of the validity of the same which might or could be raised on account of such modifications subsequent to its ratification and approval by the legislature of the state; and

Whereas said railway company and the state have entered into negotiations which have resulted in the making of a new contract and agreement and the setting aside and cancellation of the contract and agreement made and entered into on September two, nineteen hundred twenty-six, and on file in the office of the secretary of state of the State of Michigan, subject to the ratification and approval of the same by the legislature of the State of Michigan and by the board of directors of said railway company;

Now, therefore, it is hereby agreed by and between the said railway company, party of the first part, and the State of Michigan, party of the second part, as follows:

1

That the contract and agreement heretofore made and entered into under date of September two, nineteen hundred twenty-six, and filed in the office of the secretary of state of the State of Michigan on the third day of September, nineteen hundred twenty-six, whether valid or invalid, be and the same is hereby cancelled, set aside and held for naught, on the approval of this contract by the legislature [fol. 34] and its execution as herein contemplated.

2

That the State of Michigan shall, upon the ratification, approval and execution of this contract by the parties thereto, as required by law, proceed with all convenient speed to procure or cause to be procured a new right of way one hundred feet wide for said railway company for the purpose of constructing thereon a new double track railroad, as and where provided in this contract, and the state shall, in the first instance, advance the money to defray the expense of procuring the same.

3

Immediately after the ratification, approval and execution of this contract by the respective parties thereto as herein provided, said railway company shall, upon the new right of way being procured by the state, at once take charge of and construct with all convenient speed upon said new right of way so to be procured, a single track railroad, together with the necessary grade separations and approaches, sidetracks, switches, incidents and appurtenances, in accordance with the plans and specifications annexed to the contract made and entered into September two, nineteen hundred twenty-six, between the parties hereto and filed in the office of the secretary of state of the State of Michigan on September three, nineteen hundred twenty-six, which plans, specifications and blueprints are made a part hereof,

except as herein modified or as they shall hereafter be modified as provided herein.

[fol. 35]

4

That said railway company, upon the completion of its railroad upon said new right of way, shall remove its railroad tracks and equipment from the old right of way now occupied by it between the points herein designated, and the state, upon the removal of said tracks and equipment of said railway company by said railway company from said right of way, may at once take possession of the same and use and improve the same, including the railway company's present right of way through Birmingham, for highway purposes, and said railway company agrees to make, execute and deliver to the state all such deeds, releases and conveyances as shall or may be deemed necessary, requisite and proper to convey the same to the state, but there shall not be conveyed to the state, by the railway company any lands between said points other than its old right of way, and such parts of other lands owned by said railway company as shall be necessary to be acquired by the state to widen said Woodward Avenue to a width of two hundred (200) feet.

5

Upon the carrying out of this contract, and the removal of said railway tracks by said railway company from the old right of way to the new right of way, or the building of new tracks on said new right of way by the railway company, and the payment to the State of Michigan by said railway company in full for the cost and expense incurred by the state under this contract, said railway company shall forthwith surrender its special charter and any and all rights which it now has or claims to have thereunder, and incorporate under the general laws of the state providing [fol. 36] for the incorporation of railroad companies, and transfer any and all assets of said railway company as it exists under said special charter, together with all additions to and replacements of its property, to said railway company to be incorporated under the general laws of the state providing for the incorporation of railroad companies. That said railway company shall, upon the surrender of its

special charter as above set forth, thereafter be assessed for taxes in the State of Michigan, without discrimination, under the general tax laws in force in said state, from time to time, providing for the taxation of the property of railroad companies.

6

The deed or deeds of conveyance from the persons owning the lands to be acquired by the state for the new right of way of said railway company, shall be taken in the name of the State of Michigan, and when the state shall have acquired the title to all of said right of way and said railway company shall have completed the work to be by it done under this contract, the same shall be conveyed by the state to said railway company, and the governor of the State of Michigan is hereby authorized and empowered to make, execute and deliver said deed or deeds of conveyance on behalf of the state, the same to be attested by the secretary of state of the State of Michigan, and acknowledged by them and each of them under the great seal of the state.

7

The railroad company shall repay to the State of Michigan all money advanced by the state, or the state highway commissioner, in acquiring the right of way for said rail- [fol. 37] road company and in paying said railroad company, in the first instance, for doing and performing the work and in furnishing the materials contracted by it to be performed and furnished at the times and in the amounts and in the manner following: On the thirty-first day of December, in the year that the state shall have acquired control of the new right of way herein provided to be procured, the railroad company shall pay to the state the sum of two hundred fifty thousand dollars, and on each succeeding thirty-first day of December thereafter the further sum of two hunderd fifty thousand dollars: Provided, however, That when the actual cost of carrying out said contract in its entirety shall have been ascertained, then the railroad company shall pay to the state a sum equal to one fifteenth of said total actual cost, plus or minus the amount of over-payment or under-payment that shall have been made by said railroad company: And provided further,

That said railroad company shall repay to the state all the money paid, laid out and expended under the terms and provisions of said agreement within fifteen years after the first payment by it made, as herein provided. It is expressly understood and agreed that no interest charge shall be made or accepted by the state on account thereof, except on past due installments, if any, and then at the rate of five per cent per annum.

8

The state, acting through its state highway commissioner and with the assistance of the railway company, agrees, at its entire initial expense, but to be fully repaid as hereinafter provided, to acquire by purchase, condemnation or otherwise a one hundred foot right of way, hereinafter referred to as the new right of way, together with such ad- [fol. 38] ditional width as and where necessary to provide for proper cuts, fills and drainage for the proper development of said one hundred foot right of way for railroad purposes, between the aforesaid points, on the route designated on the blueprints, dated October four, nineteen hundred twenty-six, identified by the signature of the state highway commissioner and the chief engineer of the railway company, which are on file with the parties hereto and which are hereby made a part hereof, it being understood that the portion of the old right of way at or near said mile post thirteen, which lies within the new right of way, shall continue as part of the latter, and that the portion of the old right of way from said mile post twenty-two and one-tenth to mile post twenty-one and thirty-five one-hundredths which lies within the new right of way, shall continue as part of the latter; also to likewise acquire the necessary additional land for station grounds at Birmingham, on the altered and relocated route, including that necessary for depot, freight house, team track, passing tracks, and other usual and necessary appurtenances, such additional land to be four thousand feet in length and approximately three hundred feet in width, including said one hundred foot right of way, as indicated on said blueprints.

(a) It is understood and agreed that the acquisition of said new right of way and other lands shall be promptly commenced, prosecuted and completed, and that such ac-

quisition shall be under the joint supervision of the state highway commissioner and the said railway company's chief engineer; they shall jointly appoint competent agent or agents to conduct the negotiations for such right of way and other lands, and shall have full authority to fix the compensation of such agent or agents, and to discharge them [fol. 39] at any time. No purchases shall be made except on the joint approval, in writing, of said state highway commissioner and chief engineer, and should either disapprove of the price of any proposed purchase, then the same shall not be concluded, but the land therein involved shall be acquired by condemnation. When condemnation is necessary, proceedings therefor shall be instituted and conducted in behalf of the state, by its proper officers, but with the right in the railway company, through its attorney or attorneys, and other representatives, to participate in such proceedings. All expenses involved in such acquisition, including detailed surveys and map work, therefor, shall be considered and treated as a part of the cost thereof, except that there shall not be included in such expenses any allowance for the services of the said state highway commissioner or chief engineer, or the attorneys for the parties.

(b) If the state highway commissioner, in the purchase of said new right of way and other lands, finds it expedient or necessary to purchase more land, adjacent to any part thereof, than may be actually required, it is understood and agreed that he may do so, provided such purchase shall be approved, in writing, by the said railway company's chief engineer, and that the cost of such additional land shall be considered and treated as a part of the cost hereunder, and that the surplus land, either the whole or any part thereof, shall be disposed of on the best terms obtainable, at such time or times as the state highway commissioner and said chief engineer may deem expedient, if such disposition is prior to the making and delivery of the exchange deeds herein provided for, the state highway commissioner and said chief engineer to approve, in writing, [fol. 40] each and every proposed disposition thereof, and the net proceeds thereof shall be credited to the cost hereunder. If such disposition of any part of such surplus lands has not been made prior to such exchange deeds, then any

remaining portion thereof shall be included in the deed to the railway company, and it shall thereafter be the sole owner thereof.

(c) Evidences of good, merchantable title to said new right of way, and other land, in the form of abstracts or otherwise, shall, from time to time, as said right of way and other land is acquired, be furnished by the state highway commissioner to the railway company, and the cost and expense thereof shall be deemed a part of the cost of said right of way.

9

The railway company agrees, at the entire initial expense of the state, but to be fully repaid, as hereinafter provided, to itself do, or cause to be done by letting on contract to a contractor or contractors, all the work, including the furnishing of all materials for the grading of said new right of way, for a double track railroad, including all necessary drainage structures; also including the separating of the grades and crossing protection at the railroad crossings specified in general plans herein mentioned; also including the construction on said new right of way of a single track railroad, with necessary appurtenances, including construction on new right of way of telegraph pole lines and wires and other telegraph facilities of like kind as those now existing on old right of way; and also including facilities on new station grounds at Birmingham of like kind as those now [fol. 41] existing on old station grounds, all on the grade and according to the general plans and specifications annexed to the contract dated September second, nineteen hundred twenty-six, and filed in the office of the secretary of state, September third, nineteen hundred twenty-six; detailed plans and specifications to be prepared by the railway company as the work progresses, the expense thereof to be considered and treated as part of the cost of the work hereunder, all to be of the standard of first class for a modern railroad, not less than required by law; said work to be commenced and prosecuted with reasonable diligence after the new right of way has been acquired; Provided, That the railway company, at its option, may, before said new right of way has been fully acquired, com-

mence and prosecute such work in any section where sufficient of the new right of way has been acquired to permit of expeditious and economical work.

(a) It is understood and agreed that the state highway commissioner, with the assistance of the railway company, shall procure any and all necessary public approval for the work to be done hereunder; and that the railway company, with the assistance of the state, shall procure any and all necessary approval from the interstate commerce commission for the abandonment of its old rights of way and relocation on its new right of way; and that any damages and/or expenses arising out of the carrying out of this contract shall be considered and treated as a part of the cost thereof.

(b) When the single track with appurtenances has been constructed as aforesaid, the railway company shall physically connect the same with its railroad at said mile posts thirteen and twenty-two and one-tenth, the expense thereof to be considered and treated as part of the cost of the work [fol. 42] hereunder.

(c) It is understood that it shall be optional with the railway company to itself perform any or all of the work hereby provided for, or to let the same on contract to a contractor or contractors. As to work which the railway company elects to let to a contractor, it shall procure proper bids of contractors, and will award the work to contractor or contractors at prices which shall first have been approved, in writing, by the state highway commissioner, and will make the necessary contract or contracts with the contractor or contractors, and pay for the work and materials by monthly estimates.

(d) It is understood and agreed that the railway company shall appoint a competent engineer to have general charge and supervision of the work herein provided for, both that performed by the railway company itself, and that performed by contractors, subject to the provisions hereof, and that he shall have authority to employ necessary assistants, including inspectors, and that the expense of such engineer, assistants and inspectors, including salaries or wages, field office, supplies, or any other items

necessarily incident to said work, shall be considered and treated as a part of the cost of the work.

(e) It is understood and agreed that, as to work performed by the railway company itself, there shall be added to the cost of all materials furnished by it from stock to accomplish such work, fifteen per cent to cover the expenses of handling in transit, freight charges accruing on materials (the shipment of which originates on lines of railway companies comprising the Grand Trunk railway system), accounting, and other like overhead expenses which it is [fol. 43] impracticable to allocate; it being understood that all other materials shipped for use in such work are to be pruchased f. o. b. Royal Oak or Birmingham, for delivery at such place there as many be designated by the railway company, and said fifteen per cent shall not apply to any material so purchased.

(f) To the cost of all labor, performed by the railway company itself, including foremen, there shall be added ten per cent to cover the cost of accounting, use of small tools, and other like overhead expenses, which it is impracticable to allocate.

(g) It is further understood and agreed that, as to work performed by contractors for the railway company and as to materials purchased f. o. b. Royal Oak or Birmingham, as aforesaid, there shall be added to the cost thereof, as fixed by contract, one per cent to cover the cost of advertising for bids, letting contracts, accounting, and other like overhead expenses which it is impracticable to allocate.

(h) It is further understood that the railway company will be required to furnish certain equipment for use in such work, and it is agreed that for equipment owned or controlled by it, or by companies comprising the Grand Trunk railway system, rental may be charged, and included in the cost of the work, such rental to be reasonable and according to the prevailing charges for like or similar purposes, and also other expenses contracted therewith, as well as the actual rental and other expenses paid for equipment leased from outside parties.

(i) The railway company shall monthly render to the state highway commissioner, acting for the state, bills covering the cost to it for the preceding month, including all expenditures made hereunder, which are chargeable to [fol. 44] the cost of the work, whether for work by itself performed, or for work performed by contractors for it, according to estimates to be made by the railway company's chief engineer, the state highway commissioner or his representatives to have access to all the railway company's records pertaining to such work for the purpose of checking the same, and the state agrees to pay such monthly bills within thirty days from the date of rendition; if not paid within thirty days after rendition, said bill or bills shall bear interest at the rate of five per cent per annum until paid; and said bills, together with accrued interest thereon, shall be deductible from the next succeeding annual payment or payments under paragraph seven hereof if not paid by the state before such payments become due; such accrued interest, if any, thus deducted shall not be considered and treated as a part of the cost of the work to be repaid by the railway company under said paragraph seven.

(j) When the construction aforesaid, including the furnishing of the materials, and also including the physical connection of said new single track with the railway company's railroad at mile posts thirteen and twenty-two and one-tenth, as aforesaid, is completed, the railway company shall promptly remove the physical materials, such as rails, ties, etc., from the old right of way, and the fair, net value thereof, with proper allowance for depreciation and expense of removal, as specified in the schedule annexed to the contract dated September second, nineteen hundred twenty-six, and filed in the office of the secretary of state, September third, nin-te-n rundr-d tw-nty-six, shall then be credited to, and deducted from, the total cost incurred by the state hereunder.

[fol. 45] 10

This contract shall inure to and be binding upon the respective successors and assigns of the parties hereto, and in event said railway company consolidated with, leases or sells its railroad and other property to any other railroad

company, whether of the Grand Trunk railway system, or otherwise, the rights, duties and obligations of the parties hereunder shall run with such railroad and other property without loss or waiver thereby of any of the same, and the consolidated, purchasing or lessee railway company shall hold the same with all rights and obligations pertaining thereto hereunder, including the obligation and the right to make the payments herein specified without further responsibility for taxes in addition to the annual sum of twenty-five thousand one hundred seventy-one dollars and forty cents ($25,171.40) until the time shall have expired for the making of such payments in full to the state by said railway company, as herein specified; said railway company is not to obtain, however, an extension of the time herein specified, at which it is to come under the general railroad laws of the state for the purposes of taxation, nor be longer exempted from taxation under the general laws of the state providing for the taxation of railroad companies, by reason of any default in performance, or failure to pay, as herein provided, upon its part.

11

Should any dispute arise between the parties hereto involving any matters herein it shall be submitted to a committee composed of the governor of the State of Michigan, the president of said railway company, and a third person, [fol. 46] to be selected by them. In the event that the governor of the State of Michigan and the president of the Detroit, Grand Haven and Milwaukee Railway Company shall be unable to agree upon a third arbitrator, the then senior judge of the United States District Court, for the eastern district of Michigan; shall select such third arbitrator upon the written application of either party. Said committee shall fix a time and place of hearing, giving reasonable notice to the parties, who shall have the right to introduce such evidence and arguments as may be deemed proper, and the decision of a majority of said committee shall be final and conclusive as to the matter submitted to them. The expense of such arbitration shall be borne by the parties hereto equally, provided such committee may, in its discretion, otherwise apportion such expense.

If at any time after the execution, ratification and approval of this contract it shall be deemed necessary and advisable by the state to make additional grade separations along the line of said new right of way, in addition to the grade separations provided for in the plans and specifications herein referred to and made a part of this contract, said additional grade separations shall be made and the expense thereof be paid, as provided by the general laws of the State of Michigan governing the separation of grades at railroad crossings.

13

The state reserves the right to change or relocate the new right of way herein specified, with the consent of the chief engineer of said railway company, but in case of such change of location of new right of way, the grade thereof shall conform substantially to the grade herein referred to [fol. 47] and provided for, and the cost of securing said right of way and of paying for the same, shall be ascertained, fixed and paid as herein provided, but nothing herein contained, if it may change the total amount to be paid, laid out and expended by the state, shall change, modify or extend the time within which said railway company shall pay and reimburse the state in full for any and all moneys paid, laid out and expended by it in carrying out and performing the terms and conditions of this contract, incumbent on its part to be carried out and performed by it.

14

This contract and agreement shall not be binding until it shall have been ratified and approved by the legislature of the State of Michigan, signed on behalf of said state by the governor, attested by the secretary of state, under the great seal of the state, and signed by the state highway commissioner, and until the same shall have been executed on behalf of said railway company by its proper officers.

15

The state, on the carrying out and fulfilling of this contract by the parties hereto, expressly abandons and fully

relinquishes any right it has, or now claims to have, to purchase or otherwise acquire the railroad and/or other property of the railroad company, under the special charter or otherwise.

In witness whereof the parties hereto have caused this contract to be executed in quadruplicate, in their corporate [fol. 48] names, by their respective duly authorized officials, this — day of ——, A. D. 1927.

State of Michigan, by —— ——, Governor. Attest. —— ——, Secretary of State. —— ——, State Highway Commissioner. Detroit, Grand Haven and Milwaukee Railway Company, by —— ——, President. Attest: —— ——, Secretary.

This act is declared to be immediately necessary for the public health, peace and safety.

This act is ordered to take immediate effect.

Approved June 1, 1927.

[fol. 49] EXHIBIT "B" TO BILL OF COMPLAINT

STATE OF MICHIGAN:

IN THE PROBATE COURT FOR THE COUNTY OF OAKLAND

23548

Petition of FRANK F. ROGERS for the Appointment of Commissioners, Wilbur M. Bruckner, Attorney General; Kit F. Clardy, Assistant Attorney General

To the Probate Court for the County of Oakland:

Your petitioner, Frank F. Rogers, State Highway Commissioner of the State of Michigan, respectfully represents to the court:

1. That he is the duly elected and qualified highway commissioner in and for the State of Michigan.

2. That the highway known as U. S. Road No. 10, also known as Woodward Avenue, a portion of which lies within

the County of Oakland, State of Michigan, is under the direction, supervision and control of your petitioner as State Highway Commissioner, pursuant to the statute in such case made and provided.

3. That it has become and now is necessary to improve said road by constructing the necessary grade and drainage structures and surfacing said road and to remove from their present location the tracks of the Detroit, Grand Haven and Milwaukee Railway Company along a certain portion of the said road as detailed and set forth in the plans and specifications now on file in the offices of the State Highway Department and the Secretary of State and known as State Highway Project No. M-063-3, being [fol. 50] the project authorized and declared necessary by Act 340 of the Public Acts of 1927 of the State of Michigan, and more particularly described in a certain contract dated July 20, 1927, between the State of Michigan and the Detroit, Grand Haven and Milwaukee Railway Company on file in the office of the Secretary of State at Lansing, Michigan.

4. That by virtue of the premises it becomes and now is necessary to take the fees simple title for the public highway purposes, set forth and described in Act 340 of the Public Acts of 1927, of certain property for the purchase of which your petitioner has been unable to agree with the owners.

5. That on the 19th day of April, A. D. 1928, your petitioner, acting under and by virtue of the provisions of Act 352, Public Acts of 1925, as amended by Act 92, Public Acts of 1927 of the State of Michigan, made and filed in his office a written determination of the necessity of said Public Highway improvement project, the necessity for taking the fee simple title for Public Highway purposes aforesaid of property therein fully described as follows:

(Here follows 20 pages of legal description), including part of (5¼ acres) N. ½ of S. E. ¼ of N. E. ¼ of Sec. 3 K., Town 2 N., R. 11 E., Oakland County, Mich.

F. H. Dohany—Damage $1,137.50.

Including also 7.250 acres in the West ½ of the N. E. ¼ of Section 31, T. 2 N., R. 11 E., Oakland County, Mich.

F. H. Dohany—Damage $23,562.50. (Total of $24,-700.00).

[fol. 51] 5 (cont'd). And of the damages which in his opinion should be paid to the owners and persons interested in said described property, as compensation for the taking of such fee simple title, for said public highway improvement of said described property; and that on the 23rd day of April, A. D. 1928, your petitioner caused said written determination so made by him as aforesaid and dated the 19th day of April, A. D. 1928, to be recorded in the office of the register of deeds for Oakland County in liber 18 of miscellaneous records on pages 1 to 48, inclusive.

6. Your petitioner further shows unto the court that prior to the making of the determination described in paragraph 5 of this petition, and on to wit: the 14th day of April, A. D. 1928, he caused a hearing to be held for the purpose of determining the necessity for the construction, improvement and completion of the state trunk line road known as U. S. No. 10, also known as Woodward Avenue, from the county line between Wayne and Oakland Counties, Michigan, to the City of Pontiac, Michigan, in accordance with the plans and specifications now on file in the office of the State Highway Department and the Secretary of State and known as State Highway Project No. M-063-3, being the project authorized and declared necessary by Act 340 of the Public Acts of 1927 of the State of Michigan, and more particularly described in a certain contract dated July 20, 1927, between the State of Michigan and the Detroit, Grand Haven and Milwaukee Railway Company, now on file in the office of the Secretary of State at Lansing, Michigan, after due notice of the time and place of said hearing had been given to the several parties in interest so far as known, at least seven days before said hearing in order that said interested parties might appear and have an op-[fol. 52] portunity to defend, in accordance with the statute in such case made and provided and that said determination was not made until all parties interested, so far as known, had been given an opportunity to be heard in the premises.

7. Your petitioner further shows that since the making and filing of said written determination as aforesaid, the

amount therein named to be paid as compensation, for the taking fee simple title of said property for such public highway improvement was tendered to the persons entitled thereto, so far as known, who resided in the County of Oakland, that said tender was refused and that your petitioner thereupon deposited said sum of money with the State Treasurer of the State of Michigan to be paid to the person or persons entitled thereto upon execution and delivery of a proper release or conveyance of a fee simple title of the said described property, or subject to the order of the court in case of an award of damages by court commissioners, proof of said tender and deposit being now on file in your petitioners office in the City of Lansing, Michigan.

8. That upon the filing and recording of said written determination and proof of the tender and deposit as aforesaid, your petitioner gave notice thereof to the person or persons interested in said above described parcels of land, so far as known, said notice stating that your petitioner was about to take possession of said described land for public highway purposes as therein stated, proof of service of such notice being on file in your petitioner's office in Lansing, Michigan.

9. Your petitioner says that he has never been able to agree with the person or persons interested in said described property as owners or otherwise on the damages [fol. 53] to be paid as compensation for the taking of a fee simple title of the same for such public highway purposes and that your petitioner has taken or is about to take possession of said described land for the public highway purposes stated in said written determination.

10. That the description of the parcels of property, the names of the persons interested therein as owners or otherwise, so far as known, and the damages which in the opinion of your petitioner should be paid as compensation for such taking is fully set forth in paragraph 5 in this petition.

Whereupon your petitioner prays:

(a) That an order be made by this Honorable Court fixing a day for hearing on said petition which shall not be less than 15 days after the making of said order.

(b) That a copy of this order be published twice within 15 days prior to said date of hearing in the Birmingham Eccentric, a newspaper published and circulated in the County of Oakland.

(c) That on the day set for hearing as aforesaid the court shall enter the default of all persons interested in said described property or any of them who have not appeared and shall direct the payment to such persons of the sum or sums of money stated in the written determination hereinbefore mentioned as compensation for taking the parcel of land described in which such person or persons are interested.

(d) That on the day fixed for hearing as aforesaid if any person interested in the above described property has [fol. 54] appeared, the court shall, unless sufficient cause to the contrary be shown, appoint three disinterested persons as court commissioners to appraise the damages to be paid as compensation for the taking of a fee simple title in, over and upon the above described land for public highway purposes as set forth in said written determination above mentioned.

(e) That at the time of appointing such court commissioner- the court shall fix a time and place for the first meeting of the said court commissioners and shall authorize the said court commissioners to adjourn their meeting from time to time not later than a day to be named and that a time be fixed by this court for the filing of the report if in writing of said court commissioners.

(f) That the court shall make such other or further orders relative to the premises as may be just and proper, and your petitioner will ever pray, etc.

Frank F. Rogers, State Highway Commissioner for the State of Michigan. Wilbur M. Bruckner, Attorney General; Kit F. Clardy, Ass't Attorney General, Attorneys for Petitioner, Lansing Michigan.

[fol. 55] STATE OF MICHIGAN:

IN THE PROBATE COURT FOR THE COUNTY OF OAKLAND

In the Matter of the Petition of FRANK F. ROGERS, State Highway Commissioner for the State of Michigan, for the Condemnation of Certain Lands in Oakland County, Michigan

At a session of said Court held in the Probate Court at the Court House in the City of Pontiac, Oakland County, Michigan, on the 4th day of October, A. D. 1928.

Present: Honorable Dan A. McGaffey, Judge of Probate.

It appearing to the Court that Frank F. Rogers, State Highway Commissioner of the State of Michigan, has this day filed in said Court a petition setting forth that it has become and now is necessary to improve said road by constructing the necessary grade and drainage structures and surfacing said road and to remove from their present location the tracks of the Detroit, Grand Haven and Milwaukee Railway Company along a certain portion of the said road as detailed and set forth in the plans and specifications now on file in the offices of the State Highway Department and the Secretary of State and known as State Highway Project No. M-063-3, being the project authorized and declared necessary by Act No. 340 of the Public Acts of 1927 of the State of Michigan, and more particularly described in a certain contract dated July 20, 1927, between the State of Michigan and the Detroit, Grand Haven and Milwaukee Railway Company on file in the office of [fol. 56] the Secretary of State at Lansing, Michigan, and and that by virtue of the premises it becomes and now is necessary to take the fee simple title for the public highway purposes, set forth and described in Act 340 of the Public Acts of 1927, of certain private property for the purchase of which said petitioner has been unable to agree with the owners, and praying among other things, that the Court appoint three disinterested persons as Court Commissioners to appraise the damage to be paid as compensation for the taking of the fee simple title of the land hereinafter described for public highway purposes, the names of the persons mentioned in the petition and the

description of each piece or parcel of property being as follows:

Property of Frank H. Dohany

No. 1. All that part of that parcel of land described as follows:

Beginning at a point on the East and West ¼ line of said Section 31, which is distant Westerly 769.18 feet from the East line of said Section 31; thence extending Westerly along said East and West ¼ line a distance of 347.52 feet to a point which is distant Easterly 201.5 feet from the Easterly North and South ⅛ line of said Section; thence Northwesterly on a line which makes a Northwesterly angle of 59 degrees 46 minutes with the said East and West ¼ line a distance of 360.4 feet to the beginning of a curve; thence continuing Northwesterly on a curve to the left having a radius of 22,661.83 feet through a central angle of 0 degrees 7 minutes, a distance of 46.4 feet to a point on the Easterly North and South ⅛ line which point is distanct Northerly 351.2 feet from the East and West ¼ line of said Section; thence Northerly along [fol. 57] the said Easterly North and South ⅛ line a distance of 595.6 feet to a point, which point is Northerly 151.8 feet from the N. E. corner of the Sheffield Estates No. 1 sub-division; thenee Southeasterly on a curve to the right having a radius of 22,961.83 feet through a central angle of one degree twenty-four minutes, twenty-one seconds, a distance of 563.2 feet to a point of tangency; thence continuing Southeasterly on a tangent to the curve at said point a distance of 535.35 feet to a point of beginning; containing an area of 5.184 acres more or less, which lies within the North ½ of the Southeast ¼ of the Northeast ¼ of Section 31, Town 2 North, Range 11 East, Oakland County, Michigan, containing about .35 acres.

Owner: Frank H. Dohany.

Property of Frank Dohany

A parcel of land in the West ½ of the N. E. ¼ of Section 31, T. 2 N., R. 11 E., Oakland County, Michigan, more particularly described as follows:

Beginning at a point on the West line of lands owned by Frank Dohany (which is also the East line of the Birmingham Gardens Subdivision) said point being distant Southerly 815.3 feet from the North line of said Section 31; thence in a Southeasterly direction on a curve to the right having a radius of 22,961.83 feet through a central angle of 3° 3′ a distance of 1220.4 feet to a point on the Easterly North and South ⅛ line of said Section 31, which point is distant Northerly 151.8 feet from the S. E. corner of said Frank Dohany property, which is also the N. E. corner of the Sheffield Estates Subdivision No. 1; thence Southerly along the said Easterly North and South ⅛ line a distance of 151.8 feet to the said S. E. corner; thence Westerly along [fol. 58] the South line of said Frank Dohany's property making a Northwesterly angle of 90° 04′ with said last described course a distance of 260.42 feet to a point; thence in a Northwesterly direction on a curve to the left having a radius of 22,661.83 feet through a central angle of 1° 54′ 20″ a distance of 753.26 feet to a point on the West line of said Frank Dohany's property, which point is distant Southerly 1358.3 feet from the North line of said Section 31; thence Northerly along the West line of said Frank Dohany's property a distance of 543.0 feet to the point of beginning; containing an area of 7.250 acres more or less.

Owner: Frank H. Dohany.

It further appearing to the Court by affidavit on file in said cause, that Joseph E. Lewis, George W. Slaughter, Frank H. Dohany, William Dohany, Charles E. Dohany, John Dohany, Emmet Dohany, Sergius P. Grace, Jeanette Grace, Elmer P. Webb, Paul E. Grosse, Lilla Arndt, Arno Arndt, Mrs. Mannie Drennen, Leo E. Trend, Jr., Ann Palmer, Robert Rose, Iva Rose, Donald R. Galvin, Edgar M. Fitzsimmons, Fitzsimmons and Galvin, Incorporated, Marentette Realty Company, Securities Land Development Company and the Union Trust Company, reside out of the County of Oakland.

Therefore, it is ordered that on Wednesday, the 5th day of December, A. D. 1928, at 10 o'clock in the forenoon at the Probate Court at the Court House in the City of Pontiac, Oakland County, Michigan, be and is hereby fixed as the time and place for the hearing on said petition at which

time and place all persons interested in the property herein described shall be given an opportunity to show cause why [fol. 59] the prayer of said petitioner shall not be granted.

It is further ordered that a copy of this order shall be published in The Birmingham Eccentric, a newspaper published and circulated in the County of Oakland, Michigan, at least twice within fifteen days prior to the day and date of hearing and that a copy of such order shall be mailed to each absent or non-resident of the County of Oakland at his last known post office address, by registered mail and return receipt demanded in any case in which a copy of such order has not been served on each said absentor non-resident person.

(Sgd.) Dan A. McGaffey, Judge of Probate.

A true copy. Ruth Immick, Register of Probate.

Wilbur M. Bruckner, Attorney General; K. F. Clardy, Asst. Attorney General. Business address: Capitol, Lansing, Mich.

[fol. 60] IN UNITED STATES DISTRICT COURT

[Title omitted]

RESTRAINING ORDER AND ORDER TO SHOW CAUSE—Dec. 4, 1928

Whereas in the above cause a motion for the issuance of a preliminary writ of injunction has been duly filed, and the hearing being fixed for 9 o'clock A. M. on the 17th day of December, 1928, in the City of Detroit, Michigan, in the Post Offie Building, District Court Room; and it having been made to appear that there is immediate danger of irreparable injury being caused to plaintiff, before the hearing of said application for the writ of injunction, unless the said defendants are, pending such hearing, restrained as herein set forth;

Now, therefore, take notice that you, Frank F. Rogers, State Highway Commissioner for the State of Michigan, defendant herein, your agents, servants, deputies, succes-

sors and attorneys, and each of you, are hereby specially restrained and enjoined from urging a hearing upon a certain petition filed by you, Frank F. Rogers, on the 4th day of October, 1928, in the Probate Court of the County of Oakland, Michigan, Calendar No. 23548, on Wednesday, December 5th, 1928, the date of hearing of said petition, or [fols. 61-63] at any other time thereafter and from impressing the court to grant the prayer of said petition and by its order appoint three commissioners as therein prayed, and to desist and refrain from prosecuting the proceedings initiated by said petition in said court, or before its commissioners, until the further order of this Court in the premises.

And, therefore, take notice that you, Detroit, Grand Haven & Milwaukee Railway Company, a Michigan corporation, H. W. Nelson Company a foreign corporation, and Frank F. Rogers, State Highway Commissioner for the State of Michigan, defendants herein, your agents, servants, deputies, attorneys and successors, and each of you, are hereby specifically restrained and enjoined from proceeding with the construction of said railway right-of-way, and a steam railroad, and railroad yards thereon, and any appurtenances thereto, and from doing any work of any kind, nature or description upon, across and over the property of Frank H. Dohany, plaintiff herein, said property being situated in the Northeast Quarter of Section 31, in the Township of Troy, Oakland County, Michigan, until the further order of this Court in the premises.

And it is ordered that you Frank F. Rogers, State Highway Commissioner for the State of Michigan; the Detroit, Grand Haven & Milwaukee Railway Company, a Michigan corporation, and the N. W. Nelson Company, a foreign corporation, defendants, appear before the undersigned District Judges of this Court, on the 17th day of December, A. D. 1928, at 9 o'clock A. M., and show cause, if any you have, why a preliminary injunction should not — issued as prayed in plaintiff's Bill of Complaint filed in this cause.

Arthur J. Tuttle, Charles C. Simons, Edward J. Moinet, District Judges.

Entered Dec. 4, 1928.

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF FRANK F. ROGERS, STATE HIGHWAY COMMISSIONER —Filed Jan. 3, 1929

The Answer of Frank F. Rogers, State Highway Commissioner of the State of Michigan, Defendant to the Bill of Complaint of Frank H. Dohany, Plaintiff.

I

The defendant admits the allegations contained in paragraph I of plaintiff's bill of complaint.

[fol. 65] II

The defendant admits the allegations contained in paragraph II of plaintiff's bill of complaint.

III

This defendant admits that he did hold a hearing on the matter of necessity on the 14th day of April, A. D. 1928, but says:

(a) In answer to sub-section (a), the testimony disclosed that, acting in the capacity of State Highway Commissioner, he was seeking to acquire certain properties for highway purposes and to be traded to the Detroit, Grand Haven & Milwaukee Railway Company for a part of its present right of way now necessary for the construction and improvement of state trunk line highway project No. M-063-3, otherwise known as Woodward Avenue, all in accordance with statutory authority and according to the terms of a certain contract between the state and the aforesaid railway company, as set forth in Act No. 340 of the Public Acts of 1927 of the State of Michigan.

(b) That the allegations contained in sub-section (b) are substantially correct when considered in conjunction with the facts set forth above.

(c) That the proceedings were and are now being conducted in conformity with Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927 of the State of Michigan, and by authority of Act No. 215 of the Public Acts of 1925 of the State of Michigan, but denies that the testimony discloses that the aforesaid Acts in any way deny to this plaintiff any right of just compensation as required by the Constitution of the United States [fol. 66] and of the State of Michigan. This defendant further says that the temporary restraining order issued out of this Court has prevented the appointment of commissioners to award compensation for the taking of this plaintiff's property and that until such commissioners have been appointed and have proceeded in accordance with the provisions of the aforesaid statutes, the measure of the alleged damage suffered by this plaintiff will not have been determined. This defendant denies that the aforesaid Acts in any way violate either the Constitution of the United States or the State of Michigan.

(d) That as to the allegations in sub-section (d), this defendant neither admits nor denies the truth thereof, but leaves this plaintiff to his proof thereof, but believes that the plaintiff's property will not be entirely cut off from approach to Woodward Avenue, but will in reality have free and unhindered avenues of approach to said street.

(e) That the testimony does not disclose that the allegations contained in sub-section (e) are true and, for further answer, says that all the things set up and alleged in this sub-section are matters of conjecture and surmise only and that, at the hearing on necessity, evidence bearing on these questions could not be properly presented or considered because the question of compensation for the taking of property was not before the Commissioner, because the so-called highway condemnation statutes provide for the appointment of three commissioners by the Court to appraise the properties and fix the compensation therefor at some time subsequent to the determination of the necessity for taking the property.

[fol. 67] IV

This defendants admits the allegations contained in paragraph IV of the plaintiff's bill of complaint and says that

the determination of necessity therein referred to was properly and lawfully made by this defendant and proper service made upon the plaintiff herein.

V

This defendant, in answer to paragraph V of the plaintiff's bill of complaint, denies that the evidence discloses that he awarded or refused to award plaintiff any consequential damages, or damages for depreciation in the value of the remainder of the tract from which land was being taken, and says that in making the determination of necessity, in accordance with statutory authority, he named a sum which in his opinion would fully compensate this plaintiff for all the damages he would suffer of any kind or nature whatsoever, and further says that the sum named in the determination of necessity was the amount which in his opinion would fully compensate this plaintiff for all property taken and damage suffered, and that it was just compensation as required by the Constitution of the State of Michigan and of the United States of America.

VI

This defendant, in answer to paragraph VI of the plaintiff's bill of complaint, admits that he has taken possession of and claims title to the property for and on behalf of the State of Michigan, and that it was taken for highway purposes and is being so used, and further says that the award set forth in the determination of necessity represents the [fol. 68] amount which in his opinion will fully compensate this plaintiff for the taking of this plaintiff's property. This defendant, for further answer, says that he is not required to make any special award separate and apart from any other award for consequential damages, or damages for diminution of value to the remainder of any tract of land, a part of which is being taken for highway purposes, or that he is required to make any special award for any kind of damages. This defendant for further answer says that the sum named in his determination of necessity represents the amount which in his opinion would fully compen-

sate this plaintiff for all the damage suffered and is full compensation for all the property taken.

VII

This defendant says, in answer to paragraph VII of plaintiff's bill of complaint, that he has no knowledge of the facts therein alleged, but leaves the plaintiff to his proof thereof, and further says that he believes, however, that the facts therein set forth are not true as to the amount of damage the said plaintiff will suffer, and as to the rest, says that they are not material even if found to be true.

VIII

This defendant says, in answer to paragraph VIII of the plaintiff's bill of complaint, that in acquiring properties for this highway project, including the lands belonging to the plaintiff, he has proceeded in accordance with the terms of the so-called highway condemnation statutes, and in accordance with the provisions of Act No. 215 of the Public Acts of 1925, and Act No. 340 of the Public Acts of 1927, but denies that any of these Acts in any way contravene the provisions of the Fourteenth Amendment to the Constitu-[fol. 69] tion of the United States, and further denies that these Public Acts or any of the steps he has taken in accordance with the terms thereof have in any way denied this plaintiff the equal protection of the laws or have not been in accordance with due process of law. This defendant further denies that Act No. 215 of the Public Acts of 1925 arbitrarily and capriciously places the plaintiff in a discriminate class, and deprives him of the privileges, rights and immunities preserved to and enjoyed by others under like circumstances and conditions and similarly situated. This defendant further denies that this plaintiff has been thereby deprived of any right of any nature whatsoever guaranteed to him by the Constitution of the United States or by the Constitution of the State of Michigan.

IX

This defendant, in answer to paragraph IX of the plaintiff's bill of complaint, admits the allegations contained in said paragraph are true.

X

This defendant, in answer to paragraph X of the plaintiff's bill of complaint, says that he has never taken any posistion with regard to this plaintiff's right to consequential damages, and denies that he has ever asserted that this plaintiff was not entitled to full and adequate compensation for the taking of his property. He further denies that the statutory provisions with regard to negotiating for the purchase of the plaintiff's property have in any way been violated, and further says that all constitutional requirements in that direction have been fully met and complied with. He further says that the highway condemnation statutes, as herein mentioned, confer adequate authority [fol. 70] upon the Commissioners to be appointed by the Probate Court of Oakland County to award this plaintiff just compensation as required by the Constitution of the United States of America and by the Constitution of the State of Michigan.

XI

This defendant, in answer to paragraph XI of the plaintiff's bill of complaint, says that he believes that the sections of the Compiled Laws of Michigan of 1915, as set forth in this paragraph of the bill of complaint, are substantially as therein set out, but denies that this plaintiff has any vested right to any particular kind of procedure set forth therein, and further denies that the procedure being used for the condemnation of this plaintiff's land will in any way deprive him of just compensation as required by the Constitution of the United States of America and the Constitution of the State of Michigan. This defendant further says that the provisions of the so-called Highway Condemnation Acts and the so-called Railroad Condemnation Acts, with respect to just compensation and the measure of damages, are substantially the same, and denies that the highway condemnation statutes under which he is proceeding will in any way violate any constitutional provision. This defendant, further answering, says that the property of this plaintiff is being taken for highway purposes and not for railroad purposes, and that the only procedure which this defendant is authorized to use is that now being applied.

XII

This defendant, in answer to paragraph XII of the plaintiff's bill of complaint, says that he has complied with all the statutory provisions of the so-called Highway Con-
[fol. 71] demnation Acts, and that the right of possession and title to the property is now vested in the State of Michigan. This defendant, further answering, says that the property is being devoted to a proper highway purpose in accordance with the constitution and statutes of the State of Michigan.

XIII

This defendant, in answer to paragraph XIII of the plaintiff's bill of complaint, denies that section 4 of Act No. 340 of the Public Acts of 1927, or any other provision thereof, contravenes the Fourteenth Amendment to the Constitution of the United States, and denies that it deprives the plaintiff of the constitutional guarantee of due process of law and the equal protection of the laws. He further denies that this plaintiff has any constitutional right to have the question of the necessity for taking his property determined by a jury in a court of record, as provided in the so-called Railroad Condemnation Acts, and denies that section 4 of Act No. 340 of the Public Acts of 1927, or any other part thereof, constitutes an arbitrary and capricious classification of the plaintiff and others owning land which is now being taken for the aforesaid highway project. This defendant further denies that this plaintiff is denied access to the tribunal designated by the general laws of the state, and says that all constitutional guarantees with regard to due process and the equal protection of the laws have been carefully preserved to this plaintiff.

XIV

This defendant, in answer to paragraph XIV of the plaintiff's bill of complaint, denies that the said Railway
[fol. 72] Company is granted any special immunity of any kind, and denies that the provisions of the Fourteenth Amendment to the Constitution of the United States of America are in any way violated, and denies that Act No. 340 of the Public Acts of 1927 and Act No. 352 of the

Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, are void.

XV

This defendant, in answer to paragraph XV of the plaintiff's bill of complaint, denies that the proceedings being taken by this defendant, in accordance with the terms of the so-called Highway Condemnation Acts, constitute a denial of this plaintiff and other railroad companies within the State of Michigan of the equal protection of the laws, in contravention of the Fourteenth Amendment of the Federal Constitution, or of the Constitution of the State of Michigan.

XVI

This defendant in answer to paragraph XVI of the plaintiff's bill of complaint, denies that Article 13, Section 1, of the Constitution of the State of Michigan is in any way violated by any act of this defendant, or any of the defendants, and denies that the so-called Highway Condemnation Acts under which he is proceeding will in any way deprive this plaintiff of any part of the just compensation required to be paid him under the provisions of our State Constitution.

(b) This defendant denies that Article 2, Section 16, of the Constitution of the State of Michigan is in any way violated, and expressly denies that he has been deprived of the right to make a proper claim for all damage which he may suffer by reason of the State's taking part of his [fol. 73] property for highway purposes. This defendant further says that the time and place for this plaintiff to present his claim or claims for compensation is before the Commissioners to be appointed by the Probate Court of Oakland County, after the temporary restraining order heretofore issued out of this Court in this cause has been set aside and dismissed, and not until then.

(c) This defendant denies that Article 1, Section 2, of the Constitution of the State of Michigan will be violated in any way, and that the plaintiff will be denied the equal protection of the laws, and his property taken without due process of law.

(d) This defendant denies that Article 2, Section 13, of the Michigan Constitution will be violated in any way, and says that this plaintiff does not possess any constitutional right to have a jury pass upon his measure of damages.

(e) This defendant denies that Article 13, Section 2, of the Constitution of the State of Michigan is in any way violated, and says that the act of the legislature authorizing this defendant to acquire this plaintiff's property, together with other property, for the purpose of trading it for a part of the present right of way of the Detroit, Grand Haven & Milwaukee Railway Company, does not deprive this plaintiff, or any other land owner, of any right guaranteed to him by either the Constitution of the United States of America or of the State of Michigan, and that this plaintiff's property is being acquired for highway purposes under the proper statutes, and that this plaintiff will obtain just compensation for the taking of his property.

(f) This defendant denies that Article 5, Section 21, of the Michigan Constitution is in any way violated by Act [fol. 74] No. 340 of the Public Acts of 1927, and denies that the title is too narrow.

XVII

This defendant, in answer to paragraph XVII of the plaintiff's bill of complaint, denies that the taking of this plaintiff's property, and all other property in accordance with the provisions of Act No. 340 of the Public Acts of 1927 and the other Acts pertaining thereto, is not a public necessary, and further denies that the surrender of the railway franchise is not a public necessity, and further denies that the taking of the present right of way of the Railway Company as described in this paragraph is not a public necessity. This defendant further says that the necessity for widening Woodward Avenue, for taking the present right of way of the Railway Company, for relocating the line of the Railway Company, for taking this plaintiff's land and other properties for the purpose of exchanging with the Railway Company, and the necessity for taking all the separate and individual pieces of property

needed, has been duly and lawfully determined. This defendant further says that the widening of Woodward Avenue and the securing of this plaintiff's property and others for the purpose of exchanging it with the Railway Company is part of one project and one project only, and inseparately linked and connected together.

XVIII

This defendant, in answer to paragraph XVIII of the plaintiff's bill of complaint, admits that Section 1 of Act No. 340 of the Public Acts of 1927 is substantially as set forth by the Plaintiff.

[fol. 75] XIX

This defendant, in answer to paragraph XIX of the plaintiff's bill of complaint, says that the State of Michigan is now proceeding to procure properties, including the plaintiff's land, for a proper highway purpose, and that this defendant is exercising the power of eminent domain for and on behalf of the State of Michigan in procuring such property for a proper highway purpose, and denies that in so doing this plaintiff is in any way deprived of any vested rights guaranteed to him by the Constitution of the United States of America or by the Constitution of the State of Michigan, and denies that the Acts under which he is proceeding to acquire this property contravene any of the provisions of the Fourteenth Amendment to the Constitution of the United States by granting a special immunity to the Railway Company from any liability, and by depriving the plaintiff of any vested rights, privileges or immunities which he may possess under the so-called Railway Condemnation Act. This defendant, further answering, denies that this plaintiff is being deprived of the equal protection of the laws and that his property is being taken without due process of law.

XX

This defendant, in answer to paragraph XX of the plaintiff's bill of complaint, denies that Act No. 340 of the Public Acts of 1927 is unconstitutional in any way, and denies that the Probate Court of the County of Oakland is without

jurisdiction to grant the prayer of this defendant's petition [fol. 76] filed in the said Court on October 4, 1928, or to entertain any proceedings thereunder.

XXI

This defendant, in answer to paragraph XXI of the plaintiff's bill of complaint, admits that the acquirement of the plaintiff's property and other lands for the purpose of trading to the Railway Company for its present right of way, and the acquirement of the present right of way of the Railway Company and the construction of the Woodward Avenue project, as a whole, are all integral parts of one project, but denies that this fact or that the provisions of Act No. 340 of the Public Acts of 1927, or of Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, in any way contravene the provisions of the Fourteenth Amendment to the Constitution of the United States, in that this plaintiff is deprived of his property without due process of law, or that he is denied the equal protection of the laws.

XXII

This defendant, in answer to paragraph XXII of the plaintiff's bill of complaint, admits that he intends complying with the provisions of the highway condemnation statutes, and intends proceeding thereunder, but denies that this plaintiff will be deprived of any portion of his property without just compensation being made therefor, and further denies that the statutes under which he is now proceeding will in any way deprive this plaintiff of any part of his just compensation for the taking of his property. This defendant further denies that this plaintiff is in any way entitled to any of the relief prayed for.

[fol. 77]

XXIII

This defendant, further answering plaintiff's bill of complaint, says that all the questions raised by this plaintiff relative to the measure of damages to be used in fixing the compensation to be paid for the taking of his property are raised prematurely because the time for making an award has not yet arrived, because this defendant has been re-

strained by this Court in this action from causing the probate Court for the County of Oakland to appoint commissioners to take testimony and make an award to this plaintiff. Until the commissioners have been appointed and have acted under the direction of the probate Court for the County of Oakland, neither this plaintiff nor anyone else can know what their act may be.

XXIV

This defendant, further answering, says that this plaintiff has not set forth in his bill of complaint a short and plain statement of the claimed grounds upon which this Court's jurisdiction depends.

XXV

This defendant, further answering, says that all the condemnation proceedings have been conducted in the name and for and on behalf of the State of Michigan, and that the defendant, the Detroit, Grand Haven & Milwaukee Railway Company and the defendant, the H. W. Nelson Company, have been acting for and on behalf of the said State.

[fol. 78] XXVI

This defendant, further answering, says that this Court is without jurisdiction to enjoin the process of the probate Court of Oakland County, and is without jurisdiction to grant the relief asked for in said application for injunction, and that this Court is wholly without jurisdiction and this defendant therefore prays that the said bill of complaint be dismissed and the temporary restraining order heretofore issued out of this Court be dissolved and the relief prayed for be denied because:

(1) This Court is without jurisdiction to entertain same;

(2) The plaintiff's bill of complaint does not state a cause arising under the constitution and laws of the United States of America;

(3) The bill of complaint does not present any substantial Federal question;

(4) The plaintiff is not entitled to the relief prayed for;

(5) The questions raised in the bill of complaint as to measure of damages to be applied are prematurely raised;

(6) The questions raised have been determined as shown by Schedules A and B attached hereto and made a part hereof;

(7) The bill of complaint does not set up a concise statement of the grounds relied upon to confer jurisdiction upon this Court;

(8) It appears in the complaint filed in this cause that the plaintiff and this defendant and the defendant, the [fol. 79] D. G. H. & M. Railway Company, are all citizens of the State of Michigan, and therefore there is no diversity of citizenship from which this Court may have jurisdiction;

(9) The rule of law as laid down by our Supreme Court as to the right to recover consequential damages or for the diminution in value of the remainder of a tract of land where part is taken has been and is favorable to the contentions of the plaintiff, and for that reason if he should be denied recovery in the present condemnation proceedings now pending, it will be in violation of the law of this state.

Wilber M. Brucker, Attorney General; K. F. Clardy, Assistant Attorney General, Attorneys for Defendant.

Dated at Lansing, Michigan, this 29th day of December, 1928.

[File endorsement omitted.]

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

JOINT AND SEVERAL ANSWER OF DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY AND THE H. W. NELSON COMPANY—Filed Jan. 10, 1929

The Detroit, Grand Haven and Milwaukee Railway Company and the H. W. Nelson Company, defendants in the above entitled cause, by H. R. Martin and H. V. Spike, their

[fol. 81] attorneys, saving and reserving to themselves all manner of objection to the many irregularities, insufficiences, and errors in the plaintiff's bill of complaint contained, for answer thereto, say:

(1) On information and belief they admit the allegations contained in paragraph I of the bill of complaint.

(2) On information and belief they admit the allegations contained in paragraph II of the bill of complaint. Further answering said paragraph II these defendants aver that the notice set out in full in said paragraph was given by personal service and publication by the defendant, Frank F. Rogers, State Highway Commissioner in and for the State of Michigan, for the purpose of commencing condemnation proceedings for the acquiring by the State of Michigan of the land therein described for public highway purposes in accordance with the statutes in such case made and provided.

(3) Answering paragraph III of the bill of complaint, these defendants admit that a hearing was had by the said Frank F. Rogers, State Highway Commissioner, on the 14th day of April, A. D. 1928, at the hour and place set forth in the notice described in paragraph II of the bill of complaint, at which time testimony was taken, but as to what the testimony so taken disclosed, as alleged in the various subdivisions of said paragraph III of the bill of complaint, these defendants say:

(a) In answer to subdivision (a) of said paragraph III these defendants deny that the testimony taken at said hearing disclosed that the defendant Frank F. Rogers, State Highway Commissioner, was seeking to acquire a right of way for the defendant Detroit, Grand Haven and Milwaukee [fol. 82] Railway Company, within the meaning of the language used in said subdivision (a), and in explanation thereof these defendants allege that the State of Michigan has for several years been engaged in the work of widening, and otherwise improving, Woodward Avenue, so-called, from the county line between Wayne and Oakland Counties, Michigan, to Pontiac in said Oakland County, Michigan; that said Woodward Avenue is a Federal aided road and a State trunk line highway, now known as United States Road No.

10, the construction, improvement and maintenance of which is under the supervision, direction and control of the State Highway Commissioner; that in the widening, and otherwise improving, of said Woodward Avenue the said State Highway Commissioner is acting as an agency of the State of Michigan in the performance of a governmental function; that the present railroad right of way of the defendant Detroit, Grand Haven and Milwaukee Railway Company parallels, and is immediately adjacent to, said Woodward Avenue, on the Northeasterly side thereof, from Royal Oak to Bloomfield Hills, all in Oakland County, Michigan, a distance of approximately nine miles; that in the widening and improving of said Woodward Avenue it became necessary, in the opinion of the said State Highway Commissioner, to acquire the present right of way of the defendant, Detroit, Grand Haven and Milwaukee Railway Company, where it parallels, and is immediately adjacent to, said highway, as above mentioned; that on July 20, 1927, a contract was entered into between the State of Michigan and the defendant, Detroit, Grand Haven and Milwaukee Railway Company providing, among other things, for the conveyance by said Railway Company to the State of Michigan of the Railway Company's said present right of way between the [fol. 83] points aforesaid, in exchange for a new right of way to be acquired by the State of Michigan in a location approximately three-quarters of a mile Easterly from the present railway right of way, said contract having been authorized by Act No. 340 of the Public Acts of 1927 of the State of Michigan and being the contract attached to the bill of complaint as Exhibit A; that the acquiring of the said new right of way was and is for public highway purposes and that the hearing held on the 14th day of April, 1928, as alleged in said paragraph III of the bill of complaint, was for the purpose of determining the necessity for said public highway widening and improvement and the necessity of taking the lands described in the notice set out in paragraph II of the bill of complaint for such purpose.

(b) Answering subdivision (b) of said paragraph III of the bill of complaint, these defendants admit that the allegations therein contained are substantially correct when considered in connection with the facts set forth above in answer to subdivision (a) of said paragraph III of the bill of complaint.

(c) Answering subdivision (c) of said paragraph III of the bill of complaint, these defendants admit that the proceedings therein mentioned were being conducted in conformity with Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927 of the State of Michigan, and by authority of Act No. 215 of the Public Acts of 1925 of the State of Michigan. They also show unto the Court that said proceedings were likewise by authority of Section 23 of said Act No. 352 of the Public Acts of 1925. They deny that said Acts, or any of them, or any part of them, permits the allowance of damages only for land actually taken for highway purposes and do not [fol. 84] authorize the allowance of damages for diminution of the value of the remainder of a tract of land from which land for a right of way is taken and they allege that said Acts, and each of them, authorize and permit the allowance of just compensation for the taking of land thereunder within the full meaning of that term as used in the Constitutions of the State of Michigan and the United States.

(d) Answering subdivision (d) of said paragraph III of the bill of complaint, these defendants admit that the allegations therein contained are substantially correct, except that they deny that plaintiff's land will be entirely cut off from access to Woodward Avenue and allege that said land will have substantially as free and easy access to Woodward Avenue as at present. Further answering said subdivision (d), these defendants deny that the facts therein alleged constitute a cause of action or give plaintiffs any legal ground for complaint, even if true.

(e) Answering subdivision (e) of said paragraph III of the bill of complaint these defendants deny the allegations therein contained and show unto the Court that all the matters therein alleged are matters of conjecture and surmise only.

(4) These defendants admit the allegations contained in paragraph IV of the bill of complaint and show unto the Court that the document therein set forth is a determination of necessity for the construction and improvement of Woodward Avenue, so-called, as hereinabove described in answer to subdivision (a) of paragraph III of the bill of complaint, and of the necessity for the taking of the par-

ticular lands described, including that portion of plaintiff's land therein described, for such public highway purpose, and a statement of the damages which, in the opinion of [fol. 85] the said State Highway Commissioner, should be paid to the several owners of the property therein described, including the plaintiff herein, as compensation for the taking of said property for such purpose and that said document wae made, filed and served on plaintiff in accordance with law.

(5) Answering paragraph V of the bill of complaint these defendants admit that the determination of necessity mentioned in paragraph IV of the bill of complaint, and as further described in the answer to said paragraph IV aforesaid, stated that the damages to be paid as compensation for the taking of plaintiff's land, as therein described, was the sum of money therein alleged, but these defendants show unto the Court that the statement of damages as contained in the determination of necessity is not a final determination of plaintiff's damages but is only a statement of the damages which, in the opinion of the State Highway Commissioner, as of that time, should be allowed as compensation for the taking of the land described and that said Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, of the State of Michigan, provides for the appointment by a court of record of three court commissioners who shall hear the parties and make an award of the damages which should be paid as compensation for the taking of the land described but that the proceedings for the appointment of said court commissioners to determine such damages were enjoined by a restraining order issued by this Court on the petition of Frank H. Dohany, plaintiff, and one of plaintiff's attorneys. Further answering said paragraph V of the bill of complaint these defendants deny that Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, [fol. 86] prohibits the allowance of damages for the depreciation of the value of the remainder of a tract of land from which a portion is taken and allege that said Act, as amended, permits and requires the awarding to all persons from whom property is taken of just compensation within the full meaning of that term as used in the Constitutions of the State of Michigan and of the United States.

(6) Answering paragraph VI of the bill of complaint, these defendants admit that the said Frank F. Rogers, State Highway Commissioner, has taken possession of the land therein mentioned and that a contract has been entered into with the defendant, H. W. Nelson Company, and that work was begun on said land, as therein alleged, but these defendants deny that the taking of possession, the letting of said contract, and the commencing of said work, was done without lawful authority. Further answering said paragraph VI, these defendants deny that there will be any diminution in the value to the emainder of plaintiff's tract of land and allege that said land is, by reason of its location, essentially industrial property; that the natural and reasonably to be expected development thereof will be for industrial purposes and that the value of the remainder of the tract of land after the construction and operation of a railroad on the land taken in the condemnation proceedings, as hereinabove described, will be equal to, or in excess of, the value of said remainder before the taking. They deny that there was any competent evidence in the hearing mentioned in paragraph III of the bill of complaint, and more particularly described in the answer to said paragraph III, that the value of the remainder of plaintiff's tract of land will be diminished in value and, on information and belief, allege that the State Highway Commissioner awarded just [fol. 87] compensation for the taking of plaintiff's land within the full meaning of that term as used in the Constitutions of the State of Michigan and of the United States. They further allege that the taking of possession of plaintiff's land, the entering into a contract with the H. W. Nelson Company, and the commencing of work, were all in accordance with the statute in such case made and provided and in accordance with the laws and Constitutions of the State of Michigan and of the United States.

(7) Answering paragraph VII of the bill of complaint, these defendants neither admit nor deny the contents thereof but leave plaintiff to his proof, except that they deny that the value of plaintiff's land will be diminished in the amount therein alleged, or in any amount, but allege that the value will, in fact, be increased. These defendants further allege that none of the matters averred in said paragraph VII are material to the issues of this cause, even if the same should be found to be true.

(8) Answering paragraph VIII of the bill of complaint, these defendants admit that said Act No. 340 of the Public Acts of 1927 of the State of Michigan authorizes and empowers the defendant, Frank F. Rogers, as State Highway Commissioner for the State of Michigan, to acquire, on behalf of the State of Michigan, the lands described in the contract dated July 20, 1927, between the State of Michigan and the Detroit, Grand Haven and Milwaukee Railway Company, in accordance with the general laws of the State of Michigan. They deny that Act No. 215 of the Public Acts of 1925 authorizes the State Highway Commissioner to proceed under the Railway Condemnation Act, so-called, for the acquiring of said new right of way. They admit that the [fol. 88] said State Highway Commissioner has proceeded under and in accordance with the Highway Condemnation Act, co-called, being Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927 of the State of Michigan. They deny that Act No. 215 of the Public Acts of 1925 contravenes either the due process law or the equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States or that said Act is unconstitutional for either of said reasons or for any other reason. They deny that Act No. 215 of the Public Acts of 1925 arbitrarily and capriciously places the plaintiff in a discriminate class, or that said Act deprives him of the privileges, rights and immunities preserved to and enjoyed by others under like circumstances and conditions and similarly situated and they deny that said Act No. 215 would permit the State Highway Commissioner, in this instance the defendant Frank F. Rogers, to ultimately acquire for the defendant, Detroit, Grand Haven and Milwaukee Railway Company, a right of way through plaintiff's lands without incurring liability to plaintiff for the just compensation required by the Constitutions of the State of Michigan and of the United States. Further answering said paragraph VIII, these defendants deny that the proceedings taken, and being taken, by the defendant, Frank F. Rogers, as State Highway Commissioner for the State of Michigan, contravene either the due process law or the equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States, or that said proceedings are unconstitutional in any respect.

(9) Answering paragraph IX of the bill of complaint, these defendants admit the allegation therein contained and further show unto the Court that the filing of said petition was in accordance with law and if the proceedings in-
[fol. 89] stituted thereby are not restrained plaintiff will be awarded just compensation for the property owned by him and taken for the public highway improvement hereinabove described.

(10) Answering paragraph X of the bill of complaint, these defendants, on information and belief, deny that the defendant Frank F. Rogers has ever contended that plaintiff was not entitled to any consequential damages and, on information and belief, allege that the said State Highway Commissioner has at all times contended, and now contends, that plaintiff's remaining lands will not be damaged or diminished in value by reason of the taking of the lands described in the condemnation proceedings and that the negotiations between said defendant and the plaintiff were for the payment of just compensation as required by the Constitutions of the State of Michigan and of the United States. They deny that under the provisions of the statute under which said proceedings were commenced it will be without and beyond the power and duty of the commissioners to be appointed by the probate court, as prayed for in the petition mentioned in paragraph IX of the bill of complaint, to award plaintiff any consequential damages and allege that under the provisions of said statute the said court commissioners, to be appointed as aforesaid, will be authorized and permitted, and it will be their duty, to award to plaintiff full just compensation within the meaning of the Constitutions of the State of Michigan and of the United States and that said statute fully authorizes said court commissioners so to do. These defendants further deny that it is material to the issues of this cause whether plaintiff would be otherwise entitled to be awarded other damages under the laws of the State of Michigan were his lands being taken by a railroad company in the State of Michigan for railroad purposes.

[fol. 90] (11) Answering paragraph XI of the bill of complaint, these defendants admit that the provisions of Sec-

tions 8249, 8250, 8254, 8255 and 8257 of the Compiled Laws of 1915 of the State of Michigan are substantially as set forth in said paragraph XI. Further answering said paragraph XI, these defendants deny that the plaintiff, with respect to the taking of his lands for the public highway purpose hereinabove described, has any vested rights by virtue of the Railway Condemnation Act, so-called, or that said Railway Condemnation Act gives to plaintiff any advantages, immunities or privileges which are, or will be, unconstitutionally affected by the proceedings instituted by the State Highway Commissioner in the probate court of Oakland County, Michigan, as aforesaid. They allege that the said State Highway Commissioner is lawfully and constitutionally permitted to acquire plaintiff's lands for the public highway purpose aforesaid, under and in accordance with the Highway Condemnation Act aforesaid and that plaintiff will not be unconstitutionally deprived of any benefits of the common law applicable to the measure of damages.

(15) In answer to paragraph XV of the bill of complaitn, these defendants admit the allegations therein contained but show unto the Court that the title and right to possession has legally vested in the State of Michigan under and by virtue of the laws of the State of Michigan and that plaintiff has not been unlawfully divested of his right of possession and occupancy of said property. Further answering said paragraph XII these defendants allege that the possession of said property by the Detroit, Grand Haven and Milwaukee Railway Company, and by the H. W. Nelson Company, is in their capacity as agencies of the State of Michigan and that the said Detroit, Grand Haven and [fol. 91] Milwaukee Railway Company has been, and is, acting in the premises solely as an agency of the State; that their possession is the possession of the State.

(13) They deny the allegations contained in paragraph XIII of the bill of complaint.

(14) They deny the allegations contained in paragraph XIV of the bill of complaint.

(15) In answer to paragraph XV of the bill of complaint, these defendants deny that the proceedings being taken by the defendants are to procure a railway right of way, as

that term is commonly used and applied, but say that the proceedings are in accordance with the statutes of the State of Michigan to procure property necessary to be acquired for a public improvement, to-wit the widening of Woodward Avenue, as aforesaid, and these defendants deny the allegations contained in said paragraph XV of the bill of complaint.

(16) They deny the allegations contained in paragraph XVI of the bill of complaint, including in said denial the allegations contained in each of the subdivisions of said paragraph XVI.

(17) They deny the allegations contained in paragraph XVII of the bill of complaint.

(18) Answering paragraph XVIII of the bill of complaint, these defendants admit that Section 1 of Act No. 340 of the Public Acts of 1927 of the State of Michigan contains the provision set out in said paragraph XVIII and that Section 10 of said Act contains the contract between the State of Michigan and the Railway Company attached to the bill of complaint and marked Exhibit A. Further answering said paragraph XVIII, these defendants deny [fol. 92] that the State of Michigan is acting, or has ever contended that it was acting, as the agent of the Railway Company, and aver that the State of Michigan has at all times, and now is, acting in the premises in its capacity as one of the sovereign states of the United States in acquiring plaintiff's land, as aforesaid, in the performance by the State of a governmental function, to-wit, the widening, and otherwise improving, of said Woodward Avenue. They deny that the State has withdrawn from the Railway Company, either with or without its consent, or that it has been, or is, necessary, that the State should withdraw from the Railway Company, either with or without its consent, the power to exercise the right of eminent domain, but say that the State of Michigan is now exercising the right of eminent domain to acquire plaintiff's land by virtue of valid and constitutional laws of the State of Michigan. They deny that plaintiff has any vested rights in the Railway Condemnation Law, so-called, other than such rights as are secured to him by virtue of the Constitutions of the State of Michigan and of the United States, and as to such rights the

status of plaintiff has not, and will not be, changed by reason of the proceedings commenced by the State Highway Commissioner, as aforesaid. They deny that Sections 1 and 10 of said Act No. 340 of the Public Acts of 1927 of the State of Michigan are in contravention of the Fourteenth Amendment to the Constitution of the United States or that said Sections, or either of them, grant to the Railway Company any special immunity or deprive plaintiff of equal immunities, privileges and vested rights contrary to either the Constitution of the State of Michigan or the Constitution of the United States, and they deny that said Sections 1 and 10 of said Act No. 340 of the Public Acts of 1927 of the State of Michigan, or either of them, deny to plaintiff the [fol. 93] the equal protection of the laws or deprive plaintiff of his property without due process of law.

(19) Answering paragraph XIX of the bill of complaint, these defendants deny the allegations therein contained and aver that the Probate Court of Oakland County, Michigan, does have the jurisdiction and power to grant the petition of the defendant Frank F. Rogers, State Highway Commissioner, filed in said Court on October 4, 1928, and has full power and authority to entertain the proceedings thereunder and contemplated thereby.

(20) In answer to paragraph XX of the bill of complaint, these defendants admit that the acquiring of the present right of way of the Railway Company for highway purposes, and the acquiring by condemnation of plaintiff's lands for the purpose set out in Act No. 340 of the Public Acts of 1927, constitute one project under the provisions of said Act No. 340 of the Public Acts of 1927, and that Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, of the State of Michigan, is being utilized by the defendant, Frank F. Rogers, State Highway Commissioner for the acquiring of plaintiff's land for said project but they deny that said Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, is, for this reason, or for any other reason, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States and they deny that said Act deprives plaintiff of his property without due process of law or denies plaintiff the equal protection of the laws and they deny that said Act is void.

(21) Answering paragraph XXI of the bill of complaint, these defendants admit that the said Frank F. Rogers, [fol. 94] State Highway Commissioner, intends to comply with all of the provisions of the Highway Condemnation Law, as hereinabove described, and that it is his intention to ask the Probate Court of Oakland County, Michigan, to grant the prayer of his petition and to appoint three court commissioners to view the premises described in said petition, to hear the proofs and allegations of the parties and to appraise the damages to be paid as compensation for the taking of the property described in said petition for the public highway purpose therein described and hereinabove set forth and that he intends to continue the prosecution of said proceedings to a conclusion, in accordance with the statutes in such case made and provided, but he denies that the appraisal of the damages to be paid as compensation for the taking of plaintiff's land will deprive plaintiff of any damages guaranteed to him under the Constitution of the State of Michigan or the Constitution of the United States. They deny that in said proceedings plaintiff will suffer an irreparable loss in the amount set forth in said Paragraph XXI, or in any other amount, but aver that said court commissioners will be authorized and empowered, and will be required, to award just compensation within the meaning of that term as used in the Constitutions of the State of Michigan and of the United States and they deny that the said defendant, Frank F. Rogers, ought to be restrained by the injunction of this Honorable Court in the manner and form therein alleged, or that plaintiff is entitled to any of the relief prayed for in said bill of complaint.

Wherefore defendants pray that the bill of complaint filed by the plaintiff may be dismissed, with proper costs and expenses by these defendants unlawfully sustained.

[fol. 95] Motion to Dismiss

Further answering said bill of complaint, these defendants say:

I. That the contract dated July 20, 1927, between the State of Michigan and the Detroit, Grand Haven and Milwaukee Railway Company, attached to the bill of complaint as Exhibit A, and Act No. 340 of the Public Acts of 1927

of the State of Michigan, authorizing said contract, both of which are made a part of the bill of complaint, disclose, on their face, that the Detroit, Grand Haven and Milwaukee Railway Company is acting in the premises only as an agency of the State; that the H. W. Nelson Company, the contractor doing the actual work of grading, is a sub-agent of the State of Michigan and that all acts complained of and all acts done, or contemplated being done, in the premises, have been, are, and will be, the acts of the State of Michigan; that all such acts have been, are being, and will be, done by the State of Michigan in its capacity as a sovereign state in the performance of a governmental function; that the cause of action is, therefore, in reality, against the State of Michigan and not against the Detroit, Grand Haven and Milwaukee Railway Company and the H. W. Nelson Company, except in their capacities as agencies of the State of Michigan. Consequently, there is no such diversity of citizenship as is required to give this Court jurisdiction of the subject matter.

II. That prior to the commencement of this cause plaintiff filed, in the Supreme Court of the State of Michigan, an application for a Writ of Certiorari to review the determination of necessity of the State Highway Commis-[fol. 96] sioner, made, filed and served as hereinabove set forth, in which substantially the same questions were raised as are raised by the bill of complaint filed herein. Said application for a Writ of Certiorari has never been passed upon by the Supreme Court of the State of Michigan, has never been withdrawn by the plaintiff, and is still pending in the said Supreme Court of the State of Michigan as a cause of action between substantially the same parties as are parties to the instant cause of action and in which the same questions are raised. Consequently, this Court is without jurisdiction to hear and determine the case at bar.

III. That the claimed violations of the Constitution of the United States, as set up in the bill of complaint, are based upon the single contention of plaintiff that Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, of the State of Michigan, does not authorize or permit the court commissioners appointed

by a court of record, in the manner provided in said Act, as amended, to award any compensation for the diminution in value of the remainder of a parcel of land from which a portion is taken for the public highway purpose described in the proceeding.

Said Act, as amended, known as the Highway Condemnation Law, has been interpreted by the Supreme Court of the State of Michigan as permitting and requiring said court commissioners to award damages for such diminution in value. Such an interpretation secures to plaintiff just compensation within the meaning of that term as used in both the State and the Federal Constitutions. As thus interpreted, plaintiff will not be deprived of property with- [fol. 97] out due process of law and will not be denied the equal protection of the laws. The bill of complaint, therefore, does not present a Federal question.

IV. That all questions as to the interpretation of Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, of the State of Michigan, of Act No. 340 of the Public Acts of 1927 of the State of Michigan, of the contract between the State of Michigan and the Detroit, Grand Haven and Milwaukee Railway Company dated July 20, 1927, and of Act No. 215 of the Public Acts of 1925, so far as the same relate to a claimed violation of the Constitution of the State of Michigan, have been determined by the Supreme Court of the State of Michigan adversely to the claims of plaintiff.

V. That the bill of complaint does not set up the grounds upon which it is claimed that the Federal Court has jurisdiction as required by Subdivision 2 of United States General Equity Rule No. 25.

These defendants therefore move the Court to dismiss the bill of complaint, prior to a hearing on the merits, for the following reasons:

I. Because the bill of complaint, and the exhibits thereto attached, show that there is no such diversity of citizenship as is required to vest this Court with jurisdiction of said cause.

II. Because substantially the same cause of action is now pending in a cause commenced by plaintiff in the Supreme Court of the State of Michigan prior to the commencement of this action.

III. Because the Supreme Court of the State of Michigan has interpreted Act No. 352 of the Public Acts of 1925, [fol. 98] as amended by Act No. 92 of the Public Acts of 1927, Act No. 215 of the Public Acts of 1925 and Act No. 340 of the Public Acts of 1927, of the State of Michigan, together with the contract authorized in the latter Act, contrary to the contentions of plaintiff. This Court is bound by the interpretation of said Acts and contract as placed thereon by the Supreme Court of the State of Michigan and as so interpreted the bill of complaint does not present a Federal question.

IV. Because the bill of complaint does not set up the grounds upon which it is claimed that the Federal Court has jurisdiction as required by Subdivision 2 of United States General Equity Rule No. 25.

V. Because the bill of complaint does not disclose any violation of the Constitution of the State of Michigan.

VI. Because the bill of complaint does not disclose any violation of the Constitution of the United States.

VII. Because the questions raised in the bill of complaint as to the proper measure of damages to be paid as compensation for the taking of plaintiff's land are prematurely raised. Such questions should await the confirmation of the report of the court commissioners appointed by the Probate Court in the manner provided by statute for the appraising of the damages to which plaintiff will be entitled.

VIII. Because the bill of complaint does not set up a cause of action.

IX. Because there is no equity in the bill of complaint.

X. Because the Court has no jurisdiction.

[fols. 99 & 100] XI. Because the plaintiff is not entitled to the relief prayed for.

H. R. Martin and H. V. Spike, Attorneys for Defendants Detroit, Grand Haven and Milwaukee Railway Company and H. W. Nelson Company. Business address: 400 E. Jefferson Avenue, Detroit, Michigan.

Duly sworn to by H. V. Spike. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 101] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 3118

FRANK H. DOHANY, Plaintiff,

vs.

FRANK F. ROGERS, State Highway Commissioner, et al., Defendants

No. 3122

CHARLES E. DOHANY, Plaintiff,

vs.

FRANK F. ROGERS, State Highway Commissioner, et al., Defendants

No. 3236

EUGENE WALTON et al., Plaintiffs,

vs.

GROVER DILLMAN, State Highway Commissioner, et al., Defendants

[fol. 102] OPINION—Filed June 25, 1929

Before Hickenlooper, Circuit Judge, and Tuttle and Moinet, District Judges

TUTTLE, District Judge:

These causes, which involve the same questions and are being tried together, are before this Court, constituted and

sitting pursuant to the provisions of Section 380 of Title 28 of the United States Code (formerly known as Section 266 of the Judicial Code), on an application for an interlocutory injunction to restrain the State Highway Commissioner of the State of Michigan from prosecuting certain condemnation proceedings in the courts of said state in the enforcement of certain statutes of such state, on the ground that such statutes, as sought to be so enforced, deprive the plaintiffs of their property without due process of law and deny to them the equal protection of the laws in vi-lation of the Fourteenth Amendment to the Federal Constitution.

The condemnation proceedings in question were instituted by the State of Michigan for the purpose of taking, by right of eminent domain, certain land of the plaintiffs which was deemed, and had been formally declared, by the legislature and other proper officials of said state, to be required for public use in the necessary widening and improvement of the main public state trunk highway connecting the cities of Detroit and Pontiac in Michigan. In the widening of such highway, it became necessary for the state to provide for the removal and relocation of certain railroad tracks of the defendant Detroit, Grand Haven & Milwaukee Railway Company immediately adjoining said highway and located on land needed for such widening. Thereupon, the state decided to acquire, by condemnation, other land near said tracks and to convey such land to said railway company in exchange for its land so needed, and the railway agreed to this substitution of a new right of way for the old, the removal of its tracks to such new right of way, and the conveyance *ot* its former right of way to the state for the highway purposes so desired. By Act 340 of the Public Acts of Michigan of 1927, the Michigan legislature declared this project to be a public necessity, authorized the State Highway Commissioner to acquire, "on behalf of the state by purchase or condemnation, in accord- [fol. 103] ance with the general laws of the State of Michigan," the land required for this purpose and provided for the conveyance of such land, when so acquired, to the railway in exchange for the right of way which it was to convey to the state, all as part of the highway improvement project in question.

Act 215 of the Michigan Public Acts of 1925 provides that whenever the line of any railway is upon or adjacent to a

trunk line highway and its acquisition is necessary for widening or otherwise improving such highway, the State Highway Commissioner is authorized to agree with such railway for the exchange of its right of way for other property and, after such agreement, "to acquire such other property by purchase or condemnation, and when acquired" to make such exchange accordingly "for such public highway purposes." Act 352 of the Michigan Public Acts of 1925, as amended by Act 92 of the Public Acts of 1927, prescribes the procedure applicable to the condemnation proceedings in such a case, including the manner of making just compensation for property so condemned.

The state, through its State Highway Commissioner, having instituted, in the proper state courts, the condemnation proceedings provided by these statutes, property owners affected thereby opposed such proceedings, raising various objections to the validity thereof and urging that such statutes violated several provisions of the constitution of Michigan. The Michigan Supreme Court, in the case of Fitzsimons & Galvin, Inc. vs. Rogers, 243 Mich. 649, in a well reasoned opinion, which described the general situation also presented here, considered and discussed those objections and overruled them, holding that the statutes in question were not contrary to the state constitution and that they authorized the condemnation proceedings taken. Although the constitutional objections so overruled are also urged here, this court of course, under familiar law, should accept and follow that decision of the state court of last resort as sustaining the validity under the Michigan constitution of these statutes and their applicability to these proceedings. Rindge Company vs. Los Angeles County, 262 U. S. 700.

I have carefully considered the various grounds on which these state statutes are asserted to be in contravention of the Federal Constitution, but find no merit in any of the contentions urged.

It is claimed by the plaintiffs that, because their land, if taken as sought, will itself be used not by the state as a part of the proposed new highway, but by a railway com- [fol. 104] pany as a part of its right of way, such land is being taken not for highway purposes, within the meaning of the law, but for railroad purposes, and that there-

fore it cannot be condemned under the so-called highway condemnation statutes of Michigan, as the state is seeking to do, but only under the railroad condemnation statutes of the state, and as these railroad statutes, it is said by the plaintiffs, afford a more liberal and favorable measure of damages to the owners of property taken thereunder, the plaintiffs insist that in the present case they are discriminated against, as compared with the owners of property condemned by railroad companies in other cases, and that consequently they are being denied the equal protection of the laws guaranteed to them by the Federal Constitution. I cannot agree with this argument, which, I think is completely answered and overruled by the decision of the United States Supreme Court in Brown vs. United States, 263 U. S. 78. Under the principle applied in that case, I am satisfied that, in view of the object here sought to be accomplished by the state, the taking of this land must be regarded as a reasonable adaptation of proper means for the acquisition of this land for highway purposes and that the fact that such land is not to be physically used as a part of the highway thus sought to be constructed does not change the real nature of the transaction, which is the taking of land for the widening of a public highway. The same principle was announced and applied, under substantially similar circumstances, in Pitznogle vs. Western Maryland Railroad Co., 119 Md. 673, 87 Atl. 917, and Rogers vs. Bradshaw, 20 Johnson (N. Y.), 735. This condemnation proceeding is brought by the state, in its own interest and for its own public purposes, and not by, nor on behalf of, a railroad company; and its object is the condemnation and taking of property for the purpose of improving a public highway and not for any railroad purpose. There is, therefore, no sound basis for this contention that the proceedings here sought to be enjoined will result in either the denial of the equal protection of the laws or the deprivation of property without due process of law.

The constitution of Michigan permits, and the statutes of the state provide, a different procedure as between condemnation proceedings brought by the State and those brought by railroads or other public corporations, although such constitution requires, in all cases, that "private prop-
[fol. 105] erty shall not be taken * * * for public use

without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law." In view of this broad guaranty of just compensation, which is observed and fulfilled by the statutes in question, there is nothing in the Federal Constitution which prevented the state of Michigan from the exercise of its own discretion and judgment in the adoption of the particular methods of enforcement of the right of eminent domain prescribed in the statutes here involved. A. Backus, Jr. & Sons vs. Fort Street Union Depot Co., 169 U. S. 557; Joslin Manufacturing Co. vs. Providence, 262 U. S. 668; Rindge Co. vs. Los Angeles County, supra.

I have examined with care all of the reasons and arguments presented by the plaintiffs in support of their claim that their rights are being invaded in respect to the matters urged and am clearly of the opinion that such claim is without merit and that the temporary restraining order now in effect must be dissolved, the application for an interlocutory injunction denied, and the bill dismissed.

Arthur J. Tuttle, District Judge.

Detroit, Mich., June 24, 1929.

I concur: Edward J. Moinet, District Judge.

Detroit, Mich., June 25th, 1929.

[fol. 106] In United States District Court

Before Hickenlooper, Circuit Judge, and Tuttle and Moinet, District Judges

Concurring Opinion

Hickenlooper, Circuit Judge:

I concur in the result reached by the majority of the court but cannot concur wholly in the reasoning whereby that result is attained. Under the circumstances of this case I feel that it must be conceded that the plaintiffs' property is being appropriated for railway purposes and not for a highway. It is being taken under the provisions of Act

340 of 1927 and this Act expressly provides for an appropriation for railway right of way. This is recognized by the Supreme Court of Michigan in the case of Johnstone v. D., G. H. & M. Ry. Co. et al. (Not yet officially reported), where the court says: "In determining plaintiffs' compensation, the benefits to their property, if any, arising from the construction and operation of the railroad, are proper to be considered." In Fitzsimmons v. Galvin, Inc. v. Rogers, State Highway Commissioner, 243 Mich. 649, the same Court had said: "The State is taking this land for use as a railroad right of way, the procuring of which is necessitated by the construction and improvement of a state trunk line highway." All parties concede that it is to railway uses to which the land is to be put.

Nor do I think that the authorities upon which the opinion of the majority is based (Brown v. U. S., 263 U. S. 78; Pitznogle v. Western Md. R. R. Co., 119 Md. 673) go further than to sustain the contention that the underlying need for relocating the railroad (Analogous to the necessity for procuring the townsite in the Brown case and the private road in the Pitznogle case) furnishes the element of public necessity and makes the appropriation one "for a public use" as distinguished from a taking for private use. Were the railway simply moved over adjacent the highway only for sufficient distance to permit both the widening of the highway and the continued maintenance of the railway in the vicinity and substantially in its former location there would be more reason to denominate the taking as one for highway purposes. But here the railway is being entirely relocated at some very considerable distance from its former location, over more than nine miles of its length, through lands of a very different character and [fol. 107] with additional appropriation for yards and buildings. To say that because a general highway improvement gives rise to the desirability or even necessity of so relocating the railway, the property needed is being taken for highway purposes, is to fail to distinguish between the impelling reason for condemnation and the use and purpose for which the lands are in fact taken and to which they will in fact be put.

As stated, the condemnation proceedings are brought under Act 340 of 1927 which authorizes the condemnation

of property for this particular project "in accordance with the general laws of the State of Michigan." The Supreme Court of Michigan has held this law constitutional under the State Constitution and construed it as permitting the State Highway Commissioner to proceed under the Highway Condemnation Acts (Act 352 of 1925 and Act 92 of 1927) rather than the Railway Condemnation Statutes 8249-8257, inclusive (Compiled Laws of 1915). This court is bound by the decision of the Supreme Court of the State upon these two points of compliance with the provisions of the State Constitution and the scope or construction to be given the Act.

It is the contention of the plaintiffs that by invoking the procedure provided for condemnation of land for highway purposes, but without negotiation for the purchase of the property before commencing the proceedings (declared jurisdictional in respect to both highway and railway condemnations In re Rogers, 243 Mich. 517; 220 N. W. 808), the State Highway Commissioner is administratively depriving the plaintiff land-owners of the equal protection of the laws in that the land is being taken for railway purposes and plaintiffs are being denied rights given to all other land-owners whose property is taken for railway purposes under the general Railway Condemnation Statutes. The rights of which they claim to be so deprived are (a) the right to jury trial both as to necessity and compensation; (b) the right to possession of their property until damages have been finally assessed and paid; (c) the right to consequential damages; (d) the right to damages without deduction of benefits; (e) the right to attorney's fees and expenses in addition to damages; and (f) the right to review by appeal instead of by restricted writ of certiorari.

The precise question is thus whether, by the adoption of the course pursued, the plaintiffs are being subjected to dis- [fol. 108] criminatory treatment and are being deprived of any substantial and substantive rights, which are given as of right to others in like situation, viz.: others whose property is being appropriated for public purposes, not necessarily for railway purposes. In this probably lies the fallacy of plaintiffs' position. It is now established beyond controversy that a state law, valid on its face, may be adimnistered in an unconstitutional manner so as to

justify the intervention of a court of equity. Yick Wo v. Hopkins, 118 U. S. 373; Reagan v. Farmers Loan & Trust Co., 154 U. S. 362; Greene v. Louisville, etc. Ry. Co., 244 U. S. 499. It is also equally well established that the guaranty of equal protection of the laws means the protection of equal laws, operating without discrimination upon all under the same or similar circumstances. Southern Ry. Co. v. Greene, 216 U. S. 400; A. T. & S. F. Ry. Co. v. Vosburg, 238 U. S. 56; Truax v. Corrigan, 257 U. S. 312; Power Mfg. Co. v. Saunders, 274 U. S. 490. The decisive question arises under the manner of classification of the plaintiffs in determining whether they are receiving equality of treatment.

The Legislature of the State of Michigan has enacted separate laws for the condemnation of property for almost all of the purposes for which such condemnation may be had. The legislature has now enacted still another general law (Act 215 of 1925) and a Special Act (Act 340 of 1927) covering the situation where a railway is to be relocated as part of a project for highway improvement. The Supreme Court of Michigan has construed these last mentioned acts and defined their meaning and scope. The plaintiffs do not contend that they are being deprived of their property without due process of law but only that they have the right to benefit by the procedure and remedial provisions of the railway Condemnation Statutes, as distinguished from the other statutes for appropriation of property which the State Supreme Court has held were to be read into Acts 215 and 340.

The contentions of discrimination and unequal protection are of several classifications. The alleged wrongs by denial of the right to consequential damages and by discrimination in the assertion of the right to deduct benefits, are more fanciful than real. The state courts have held that consequential damages and deduction of benefits are proper subjects for consideration only in that both are inseparable from a determination of the true damages suffered. The plaintiffs are entitled to no financial advantage but only to just compensation (Cf. McCoy v. Union Elev. R. Co., 247 U. S. 354; Bauman v. Ross, 167 U. S. 548), and there is no [fol. 109] reason to assume that the damages awarded will

not be fully compensatory. In this respect we cannot say that the action of the state will be discriminatory.

It was suggested by the oral argument but not raised in the briefs that the plaintiffs in the Dohany cases were also the owners of lands abutting the railroad right-of-way at its present location adjacent the highway and were now threatened with a deduction of the benefits which would accrue to that land by reason of the removal of the railroad and to their other lands, remote from the highway, by reason of increased means of access to the main artery of travel to Detroit. To the extent that the property is benefited by the construction of the railway it is manifest the extent of damage is affected but such benefits only as pertain to such construction may be considered, not such as arise from the removal of the railway from another location although it there also abuts land owned by the plaintiffs. Such latter benefits are not germane to the subject-matter of the litigation, which relates solely to the appropriation, and the consideration given benefits in fixing the amount of damage arising from such appropriation and the construction of the railway should exclude those benefits which are remote rather than direct. But there is no substantial reason to believe that such indirect, collateral and incidental benefits will in fact be deducted in the absence of any specific legislation authorizing it; and even if threatened there is even less reason to believe that the plaintiffs will not secure wholly adequate relief at law against the contention. The remedy at law being adequate, a court of equity should not take jurisdiction.

The contentions of the right to jury trial instead of a hearing before a properly constituted, constitutional tribunal of three commissioners, to less limited appeal privileges, the wholly statutory right to negotiation (held not to be provided for under Acts 210 and 340) and the legislative determination of necessity (held not to violate the State Constitution), all pertain to matters of procedure in which plaintiffs have no vested right to a continuance of past practices. "Each succeeding legislature may establish a different one, providing only that in each is preserved the essential elements of protection." Backus v. Union Depot Co., 169 U. S. 557, 570. When such essential elements are

so preserved, the most obvious being the right to a hearing before a proper tribunal, the determination of proper com-
[fol. 110] pensation and the payment or securing of payment of the compensation so determined, the property owner is deprived of no right to which he is entitled under the Federal Constitution.

The alleged discrimination by excluding attorney's fees and expenses from the measure of damage in this case, while making such allowances in other cases of condemnation for railway purposes, is much in the same category as matters of procedure. The right to attorney's fees and expenses, not usually forming part of the costs, is not a fundamental right. When allowed, the allowance is rather a matter of favor than of right. Upon this contention we consider the case of Joslin Mfg. Co. v. City of Providence, 262 U. S. 668, as conclusive and binding upon us. The plaintiffs are not denied a "right" given to others but complain because they are not also accorded a "gratuity" in some cases extended to others.

This leaves only the question of the possession of the property until compensation has in fact been paid. The Constitution of Michigan provides that property shall not be taken for public use without just compensation "being first made or secured." Article XIII, Section 1. The public necessity for appropriation being established it is entirely consistent with this provision and with the Federal Constitution to provide that immediate possession be taken and the public need and improvement be not delayed over a period of protracted litigation. Backus v. Union Depot Co., supra.

In substance, while differing from the conclusion of the majority of the statutory court that this is a taking "for highway purposes," I am of the opinion that by Acts 215 and 340 the state legislature has provided an individual procedure and method for the appropriation of property for railroad purposes to be followed in those cases, and those only, in which the primary necessity arises from a highway improvement and in which the land taken is to be used for exchange purposes. In providing this distinct procedure there is no violation of the due process clause, the plaintiffs are deprived of no fundamental rights, and I am unable to say that the initial or motivating cause being

in the highway improvement, the desirability of centralizing the control in the Highway Commissioner so that the whole work may proceed as a single project, the general diversity of separate laws for the appropriation of property in Michi-
[fol. 111] gan for the several different purposes, and the rather distinct and unique situation here present, do not afford reasonable ground for separate classification. The law would seem to go no further than the need, as the legislature saw it, and thus to afford no ground for claim of discrimination. Compare Barrett v. Indiana, 229 U. S. 26; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224; Perley v. N. Car., 249 U. S. 510.

I concur in the dismissal of the plaintiffs' bills.

[fol. 112] IN UNITED STATES DISTRICT COURT

In Equity. No. 3118

FRANK H. DOHANY, Plaintiff,

vs.

FRANK F. ROGERS, State Highway Commissioner, et al.

DECREE—June 25, 1929

By Tuttle, J.:

The Order to Show Cause heretofore issued herein, and Motion to Dismiss Bill of Complaint, having been heretofore duly argued and submitted and the Court having taken time for mature deliberation thereon, and being fully advised in the premises, do now here Order, Adjudge, and Decree that the Restraining Order heretofore issued herein, be, and the same is hereby vacated and set aside, and Bill of Complaint dismissed, for reasons set forth in the written Opinion this day filed herein.

Entered June 25th, 1929.

Tuttle, J.

[fol. 113] IN UNITED STATES DISTRICT COURT

Title omitted

PLAINTIFF'S ASSIGNMENT OF ERRORS—Filed July 24, 1929

Now comes the plaintiff in the above entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above entitled cause from the order and decree made by this Honorable Court on the 25th day of June, 1929:

1

The Court erred in refusing to grant an interlocutory injunction pending a hearing on the merits of the case.

2

The Court erred in its finding that plaintiff had not been deprived of his property without due process of law.

3

The Court erred in its finding tht plaintiff had not been denied the equal protection of the laws.

4

[fol. 114] The Court erred in dismissing plaintiff's bill of complaint.

5

The Court erred in entertaining the defendants' motions to dismiss plaintiff's bill of complaint at the three judge statutory hearing, because the three judges comprising such tribunal were convened for the single purpose of granting or denying plaintiff's motion for an interlocutory injunction, and were without jurisdiction to hear such motions to dismiss or to enter a final decree dismissing plaintiff's bill of complaint.

6

The Court erred in vacating the temporary restraining order theretofore issued in the case, there being no jurisdiction to dissolve such restraining order.

7

The Court erred in entering the order and decree dismissing plaintiff's bill, vacating the restraining order and refusing to grant plaintiff's application for an interlocutory injunction, because District Judge Tuttle was without jurisdiction to enter such order and decree, the three judges comprising the tribunal who heard plaintiff's motion for an interlocutory injunction having not evidenced their assent thereto by their signatures or by their announcement in open court with such three judges sitting and directing the tested order and decree.

8

The Court erred in failing to find that Act 215, of the Public Acts of 1925, of Michigan, is void, because it denies to the plaintiff the equal protection of the laws, and deprives him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

9

The Court erred in failing to find that Act 340 of the Public Acts of 1927, of Michigan, is void, because it denies to the plaintiff the equal protection of the laws and deprives [fol. 115] him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

10

The Court erred in failing to find that Act 352, of the Public Acts of 1925, as amended by Act 92, of the Public Acts of 1927, of Michigan, is void, because it denies to the plaintiff the equal protection of the laws and deprives him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

11

The Court erred in failing to find that Section 2 of Act 215, of the Public Acts of 1925, of Michigan, was void,

because it allowed the State Highway Commissioner to launch his condemnation proceedings in a highway condemnation tribunal instead of a railway condemnation tribunal, thereby depriving plaintiff of the equal access to the railway condemnation tribunal, as enjoyed by all others similarly situated, and thereby denying to the plaintiff the equal protection of the laws.

12

The Court erred in failing to find that Section 2 of Act 215, of the Public Acts of 1925, of Michigan, specifically authorized the State Highway Commissioner to deny to the plaintiff the equal protection of the laws by allowing him to arbitrarily select either the general highway condemnation act, or the public corporations and state agencies condemnation act, under which to proceed to condemn plaintiff's property.

13

The Court erred in failing to find that Section 2 of Act 15, of the Public Acts of 1925, of Michigan, allowed arbitrary selection and classification by a state administrative officer, thereby denying to plaintiff the equal protection of the laws.

[fol. 116]

14

The Court erred in failing to find that Section 4 of the Act 340, of the Public Acts of 1927, of Michigan, authorized the State Highway Commissioner to institute proceedings to condemn plaintiff's property in accordance with the general laws of the State, not designating which general condemnation law, but allowing the State Highway Commissioner to arbitrarily select the general law under which he desired to proceed, thereby denying to the plaintiff the equal protection of the laws.

15

The Court erred in failing to find that, even though Act 352, of the laws of 1925, as amended by Act 92, of the laws of 1927, of Michigan, be fair on its face, and impartial in appearance, yet, in this case, it is being applied and admin-

istered by the State Highway Commissioner, one of the defendants, with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between plaintiff and others in similar circumstances, that the proceedings under it are void, and that said defendant should be restrained from continuing such proceedings.

16

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, allowed the State Highway Commissioner to arbitrarily discriminate against plaintiff in invoking proceedings under any one of the many general condemnation laws of the state, thereby denying to plaintiff equal protection of the laws.

17

The Court erred in its failure to find that, the action of the State Highway Commissioner denied plaintiff the equal protection of the laws by arbitrarily selecting the "highway condemnation statute," under which to institute proceedings, instead of the "Railway condemnation act" or the public corporations and state agencies act.

[fol. 117]

18

The Court erred in its failure to find that Section 2 of Act 215, of the Public Acts of 1925, of Michigan, specifically authorized the State Highway Commissioner to arbitrarily select as to whether he would invoke the liberal terms of the public corporations and state agencies act, or whether he would proceed under the stringent highway condemnation act, thereby allowing arbitrary selection in the enforcement of the laws, and denying plaintiff the equal protection of the laws.

19

The Court erred in its failure to find that Section 4 of Act 340, of the Public Acts of 1927, of Michigan, authorized arbitrary selection, not based upon a finding or judicial determination, on the part of the State Highway Commissioner, in choosing a condemnation law, under which to

proceed, thereby denying plaintiff the equal protection of the laws.

20

The Court erred in its failure to find the method used by the State Highway Commissioner in carrying out the provisions of Act 340, of the Public Acts of 1927, of Michigan, denied plaintiff the equal protection of the laws and deprived him of property without due process of law.

21

The Court erred in its failure to find that a law authorizing arbitrary selection by an administrative officer in carrying out the laws, was void upon its face.

22

The Court erred in its failure to find that one of the tests as to whether Section 2 of Act 215, of the Public Acts of 1925, of Michigan, denied plaintiff the equal protection of the laws, was whether or not the condemnation acts therein designated provided for different elements and measures of damages.

[fol. 118]

23

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, set up no process of law, but allowed the Highway Commissioner to select any one of many condemnation processes, thereby denying plaintiff that equal protection of the law and the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution.

24

The Court erred in its finding that Act 352, of the Public Acts of 1925, as amended by Act 92, of the Public Acts of 1927, of Michigan, prescribed procedure applicable to taking land to be used for railroad purposes.

25

The Court erred in failing to find that if such highway acts provide such a taking of property for railway pur-

poses, then there are two or more general laws applicable to such taking, each prescribing different procedure and each allowing different measures of damages contrary to the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

26

The Court erred in its failure to find that when there are two or more laws applicable to the taking of private property for public use, each law providing for different processes, safeguards, privileges and immunities, and each law providing for a different measure of damages, and, that, when an administrative officer elects to proceed to condemn lands under the act allowing the fewest safeguards, privileges and immunities, and the smallest measure of damages, then such action denies the landowner the equal protection of the laws.

27

The Court erred in its finding that the ultimate use to which the property was to be put was not the factor which should designate the type of condemnation proceedings, or [fol. 119] the tribunal in which it should be launched.

28

The Court erred in finding that the taking in this case, by the State, of private property, to be traded to another for railway purposes, and pursuant to a contract was a public use.

29

The Court erred in its failure to find that the taking of the property for trading purposes was a taking of private property for a private use, thereby depriving plaintiff of his property without due process of law.

30

The Court erred in its finding that the taking of private property by the State to be traded to a railway company, which railway company had the right to exercise the

power of eminent domain within itself, was a taking for a public use.

31

The Court erred in its finding that the taking of plaintiff's property upon which a railroad is to be located was a taking for public highway purposes.

32

The Court erred in its finding that the re-location of the Grand Trunk railway tracks was so closely connected with the public highway project as to justify the taking of Plaintiff's land under the highway act.

33

The Court erred in its finding that it was necessary to re-locate the railway tracks by the State in any case; there being power in the railway company for that purpose.

34

The Court erred in its finding that the taking of plain-
[fol. 120] tiff's property under the highway act, by the State, for the purpose of trading such property to the railway company for railway purposes, deprived plaintiff of his property without due process of law and denied him the equal protection of the laws.

35

The Court erred in its finding that the re-location of the railway tracks was a part of the public highway project.

36

The Court erred in its finding that this case was governed by the principles of law laid down in the case of Brown v. United States, 362 U. S. 78.

37

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, arbitrarily selected

certain property owners from a general class, thereby denying them the equal protection of the general laws of the State of Michigan, contrary to the equality clause of the Fourteenth Amendment to our Federal Constitution.

38

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, arbitrarily withdrew plaintiff from the general class of persons whose property is condemned for railway purposes, thereby denying him the equal protection of the laws.

39

The Court erred in its finding that the State had authority to exercise its own discretion and judgment in adopting methods of the enforcement of the power of eminent domain regardless of the general laws of the State; such exercise of discretion being a denial to the plaintiff of the equal protection of the laws.

40

The Court erred in its failure to find that the State of [fol. 121] Michigan cast away its mantle of sovereignty, and became the agent of the railway company, when said State entered into a contract, thereby undertaking to acquire land upon which to re-locate the tracks of said railway company, by purchase or condemnation, pursuant to Act 340, of the Public Acts of 1927, of Michigan.

41

The Court erred in its failure to find that the State could not prescribe special laws to be used by it in taking private property for railway purposes, which laws were not applicable to all such proceedings to take property for railway purposes.

42

The Court erred in its failure to find that the State, by depriving plaintiff of the right to demand a jury trial,

which right is enjoyed by all others whose property is taken for railway purposes, thereby denied plaintiff such equal protection of the laws.

43

The Court erred in its failure to find that the denying of attorney fees and expenses and right of general appeal to our Supreme Court to plaintiff, while allowing them to all other persons whose property is taken for railway purposes, denied plaintiff the equal protection of the laws.

44

The Court erred in its failure to find that Section 4 of Act 340, of the Public Acts of 1927, of Michigan, legislatively declared the taking of plaintiff's property to be a public necessity, contrary to the Constitution and adjudicated cases of Michigan, thereby denying to the plaintiff the equal protection of those fundamental provisions enjoyed by all others whose property is taken for public use, contrary to the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

[fol. 122] 45

The Court erred in its finding that plaintiff would receive that measure of compensation guaranteed by the equality clause of the Fourteenth Amendment to the Federal Constitution, although the benefits accruing by virtue of the public enterprise will be assessed and deducted from plaintiff's award, while in no other case under similar circumstances could such deduction of benefits from the award be made.

Wherefore the plaintiff and appellant prays that said decree be reversed and that said District Court for the Eastern District of Michigan, Southern Division, In Equity, be ordered to enter a decree reversing the decision of the lower court in said cause, and to reinstate plaintiff's bill of complaint.

Dohany & Dohany, Attorneys for Plaintiff and Appellant.

[File endorsement omitted.]

[fol. 123] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S PETITION FOR APPEAL—Filed July 24, 1929

To the Honorable Arthur J. Tuttle, United States District Judge; the Honorable Charles C. Simons, United States District Judge, or the Honorable Edward J. Moinet, United States District Judge:

The above named plaintiff, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 25th day of June, A. D. 1929, in which the Court vacated and set aside the restraining order heretofore issued herein, dismissed plaintiff's bill of complaint and failed to allow plaintiff's application for an interlocutory injunction, does hereby appeal from said decree to the [fol. 124] Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, under the rules of such Court in such cases made and provided.

This appeal is taken direct to the Supreme Court of the United States under the Judicial Code, Section 238, amended, and by virtue of the provisions of the Judicial Code, Section 266, amended; such portions of the Judicial Code, section 266, amended, reading as follows: "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case." And "a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

Frank H. Dohany, Plaintiff.

[File endorsement omitted.]

[fol. 125] IN UNITED SATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—July 24, 1929

On motion of Dohany & Dohany, solicitor and counsel for plaintiff, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, if any, exhibits, stipulations, and all proceedings, be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be [fol. 126] fixed at the sum of $500.00 for costs on appeal and not to act as a supersedeas bond.

Dated July 24th, 1929.

Arthur J. Tuttle, District Judge.

Entered July 24, 1929.

[fols. 127 & 128] Bond on appeal for $500.00, approved and filed July 24, 1929, omitted in printing.

[fols. 129 & 130] Citation, in usual form, showing service on Wilbur M. Brucker et al., omitted in printing.

[fol. 131] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 3, 1929

To the above-named defendants and appellees:

Please take notice, that the within Præcipe indicates the portions of the record which appellant desires to be incorporated into the transcript on appeal.

Dohany & Dohany, Attorneys for Appellants. Business address: 1021-23 Hammond Building, Detroit, Michigan.

[fol. 132] [Title omitted]

Præcipe Indicating the Portions of the Record to be Incorporated Into the Transcript

To the Clerk of said Court:

You are requested to take a transcript of the Record to be filed in the Supreme Court of the United States, pursuant to an appeal, allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

1. A complete list of the Calendar entries.

2. Plaintiff's bill of complaint, together with plaintiff's Exhibits A and B attached thereto and made a part thereof, including the petition of Frank F. Rogers, filed in the Probate Court of Oakland County, Michigan, file number 23584, and the order of Probate Judge Dan A. McGaffey made October 4, 1928.

3. Plaintiff's motion for a temporary injunction and notice of hearing. (Clerk—Found only in prayer of Bill of Complaint.)

[fol. 133] 4. The restraining order and order to show cause why an interlocutory injunction should not issue, returnable December 17, 1928.

5. Answer of Defendant Frank F. Rogers, and motion to dismiss plaintiff's bill of complaint.

6. Notice of Hearing on defendant's motion to dismiss (Clerk—Not filed of record.)

7. Joint and several answer of Detroit, Grand Haven & Milwaukee Railway Company and the H. W. Nelson Company, and motion to dismiss plaintiff's bill of complaint.

8. Notice of hearing January 21, 1929, on motion to dismiss.

9. Opinions of the Court recommending that the temporary restraining order be dissolved, and interlocutory injunction be refused, and bill of complaint be dismissed.

10. Decree vacating temporary restraining order and dismissing plaintiff's bill of complaint.

11. Plaintiff's petition for order allowing appeal.

12. Order allowing plaintiff's appeal.

13. Plaintiff's assignment of errors.

14. Citation on plaintiff's appeal.

15. Plaintiff's præcipe indicating the portions of the record to be incorporated in the transcript.

16. Plaintiff's bond on appeal.

17. Appearance of defendant Frank F. Rogers, by Wilber M. Brucker, Attorney General, and Kit F. Clardy, Assistant Attorney General.

18. Appearance of defendant Detroit, Grand Haven & Milwaukee Railway Company and H. W. Nelson Company by H. R. Martin and H. V. Spike. (Clerk—No formal appearance filed of record.)

[fols. 134 & 135] Respectfully, etc., Dohany & Dohany, Attorneys for Appellant. Business address: 1021-23 Hammond Building, Detroit, Michigan.

Due and timely service of copy of the within præcipe, and Notice thereof, is hereby accepted on behalf of defendants.

Frank F. Rogers, Wilber M. Brucker, K. F. Clardy, Attorney- for Defendants and Appellees.

Due and timely service of copy of the within Præcipe, and Notice thereof, is hereby accepted on behalf of defendants Detroit, Grand Haven and Milwaukee Railway Co., & H. W. Nelson Co.

Dated August 1, 1929.

H. R. Martin, H. V. Spike, Attorney- for Defendants and Appellees.

[File endorsement omitted.]

[fol. 136] In Supreme Court of the United States

To the above-named appellees:

Please take notice that attached hereto you will find a definite statement of the points upon which the Appellant intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof.

Yours, etc. Frank H. Dohany, Socilitor for Appellant. Business address: 1021-23 Hammond Building, Detroit, Michigan.

Dated August 29, 1929.

[fol. 137] IN SUPREME COURT OF THE UNITED STATES

DEFINITE STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY AND OF THE PARTS OF THE RECORD WHICH HE THINKS NECESSARY FOR THE CONSIDERATION THEREOF—Filed Sept. 6, 1929

To the Clerk of said Court:

Please take notice that Appellant in the above-entitled cause intends to rely upon each and every point set up and designated in his assignment of errors, which is attached hereto and made a part hereof.

The parts of the record which the Appellant thinks necessary for the consideration of the points hereinbefore designated, and upon which he intends to rely, are as follows:

1. Docket entries of the District Court.
2. Plaintiff's Bill of Complaint and Exhibits "A" and "B."
3. Restraining Order and Order to Show Cause why an Interlocutory Injunction should not issue.
4. Answer of Defendant, Frank F. Rogers.
5. Answer of Defendants, Detroit, Grand Haven & Milwaukee Railway Company, and the H. W. Nelson Company.
6. Opinion, Tuttle, D. J., and Moinet, D. J.
7. Opinion, Hickenlooper, C. J.
8. Decree of the District Court.
9. Plaintiff's Assignment of Errors.

[fols. 138 & 139] 10. Petition for Appeal.

11. Order Allowing Appeal.
12. Bond on Appeal.
13. Citation.
14. Præcipe Indicating Portions of Record to be Incorporated into Transcript of Record.
15. Definite Statement of the Points on which Appellant Intends to Rely, and of the parts of the Record which He thinks Necessary for the Consideration Thereof, and Notice.

16. Statement Particularly Disclosing the Basis on which it is Contended This Court Has Jurisdiction to Review on Appeal the Decree Below.

Yours, etc., Frank H. Dohany, Solicitor for Appellant. Business address: 1021-23 Hammond Building, Detroit, Michigan.

Dated August 29, 1929.

Due and timely service of a copy of the within definite statement of the points on which Appellant intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof is hereby accepted on behalf of the Appellee, Frank F. Rogers.

Wilber M. Brucker, Attorney General of Michigan, Solicitor for Appellee, Frank F. Rogers.

Dated Aug. 30, 1929.

Service of a copy of the within definite statement of the points on which Appellant intends to rely, and of the parts of the Record which he thinks necessary for the consideration thereof is hereby accepted on behalf of the Appellees, Detroit, Grand Haven & Milwaukee Railway Company, and the H. W. Nelson Company.

H. R. Martin & H. V. Spike, Solicitors for Appellees Detroit, Grand Haven & Milwaukee Railway Company and the H. W. Nelson Company.

Dated Aug. 31, 1929.

Assignment of errors omitted; printed side page 113 ante.

[fols. 140-143] [File endorsement omitted.]

Endorsed on cover: File No. 34,469. E. Michigan D. C. U. S. Term No. 338. Frank H. Dohany, appellant, vs. Frank F. Rogers, State Highway Commissioner for the State of Michigan, et al. Filed August 22d, 1929. File No. 34,469.

FILE COPY

SEP 6 19

CHARLES ELMORE

UNITED STATES OF AMERICA

In the Supreme Court of the United States

OCTOBER TERM, 1929.

FRANK H. DOHANY,
Appellant,

vs.

FRANK F. ROGERS, State Highway Commissioner for the State of Michigan; the DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, a Michigan Corporation and the H. W. NELSON COMPANY of Chicago, Illinois, a foreign Corporation,
Appellees.

IN EQUITY
No. 338

STATEMENT PARTICULARLY DISCLOSING THE BASIS ON WHICH IT IS CONTENDED THIS COURT HAS JURISDICTION TO REVIEW ON APPEAL THE DECREE BELOW

FRANK H. DOHANY, *in pro per,*
Solicitor for Appellant.

Dated: August 29, 1929.

Business address:
1021-23 Hammond Building,
Detroit, Michigan.

CONWAY-SCOTT COMPANY, LAW PRINTERS, DETROIT, MICH.

UNITED STATES OF AMERICA

In the Supreme Court of the United States

OCTOBER TERM, 1929.

FRANK H. DOHANY, *Appellant,* vs. FRANK F. ROGERS, State Highway Commissioner for the State of Michigan; the DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, a Michigan Corporation and the H. W. NELSON COMPANY of Chicago, Illinois, a foreign Corporation, *Appellees.*	IN EQUITY No. 338

To the Honorable Justices of the Supreme Court of the United States:

STATEMENT PARTICULARLY DISCLOSING THE BASIS ON WHICH IT IS CONTENDED THIS COURT HAS JURISDICTION TO REVIEW ON APPEAL THE DECREE BELOW

(a) The Appellant (plaintiff in the Court below), filed a bill in the District Court of the United States for the Eastern District of Michigan, Southern Division, In Equity, praying for a decree or injunction to restrain Frank F. Rogers, the State Highway Commissioner for the State of Michigan, an administrative officer, from

further proceeding to judgment in an eminent domain proceeding instituted by himself in the Probate Court for Oakland County, Michigan, to condemn land belonging to plaintiff, to be traded to the defendant, the Detroit, Grand Haven & Milwaukee Railway Company for railroad purposes. The bill also prayed for an injunction against the defendants, Detroit, Grand Haven & Milwaukee Railway Company, a Michigan Corporation, and the H. W. Nelson Company, a foreign corporation, to restrain them from going upon the lands of plaintiff and committing a trespass, thereby causing irreparable injury to plaintiff's lands.

It was plaintiff's claim that the statutes under which the State Highway Commissioner instituted his condemnation proceedings and under which the defendants, Detroit, Grand Haven & Milwaukee Railway Company, and the H. W. Nelson Company, claimed the right to go upon and destroy plaintiff's lands, were unconstitutional and void, because they denied to the plaintiff the equal protection of the laws and deprived plaintiff of his property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States of America. District Clerk's Record, p. 15 (Sup. Ct. Record, p.....).

Plaintiff attacked Act 340 of the Public Acts of 1927; Act 215 of the Public Acts of 1925; Act 352 of the Public Acts of 1925 as amended by Act 92 of the Public Acts of 1927, of Michigan, or parts thereof, for the following reasons:

1. That Act 340 of the Public Acts of 1927, of Michigan, places plaintiff in an arbitrary, discriminate and unreasonable class not based on any proper difference for the purpose of classification; that it suspends the operation of the general railway

condemnation laws, as to plaintiff, and applies to his case special laws not applicable to all persons in similar circumstances; that it authorizes arbitrary selection and classification by an administrative officer of the State; that it authorizes the taking of plaintiff's property by the State of Michigan, for the purpose which is private, and not a public use, that purpose being to trade said property after it be acquired to the defendant, Detroit, Grand Haven & Milwaukee Railway Company for railway purposes; that it authorizes the taking of plaintiff's property in this instance, under the Highway Condemnation Act, to be used for railway purposes, thereby denying rights of procedure to plaintiff, and changing his measure of damages; that all of such provisions in Act 340 deny plaintiff the equal protection of the laws and deprive him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. District Clerk's Record, pp. 20-21 (Sup. Ct. Record, p.....).

2. That Act 215 of the Public Acts of 1925, of Michigan, places plaintiff in a class which is arbitrary, discriminate, and selective, and not based upon any reasonable difference which plaintiff bears to the general class of persons whose property is taken for railway purposes; that it allows and authorizes the State Highway Commissioner, an administrative officer, to arbitrarily select the mode of procedure to be used in condemning plaintiff's property; that it allows the operation of two or more general laws to be applied to any given case where property is taken under the provisions of the Act; that it allows the State High-

way Commissioner to arbitrarily select the statute under which he shall proceed to condemn plaintiff's property; that the statutes allowed as alternatives provide for different methods of procedure, and for different measures of damages; and that the State Highway Commissioner has adopted the statute providing for the most harsh procedure, and the smallest measure of damages, to be allowed plaintiff for the taking of his property; that all of such provisions deny to the plaintiff the equal protection of the laws and deprive him of his property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. District Clerk's Record, pp. 15-16 (Sup. Ct. Record, p.....).

3. That Act 352 of the Public Acts of 1925, as amended by Act 92 of the Public Acts of 1927, of Michigan, as applied in this case are discriminatory, unequal, and arbitrarily applied to the taking of plaintiff's property; that even though said statutes be fair upon their face, and constitutional if applied in the proper instance, that in this instance said statutes are applied in an arbitrary and discriminatory manner and the action of the State Highway Commissioner is unconstitutional, and that said statutes are being applied to this particular taking so as to deprive the plaintiff of his constitutional rights, both as to procedure and as to the measure of damages for the taking of his property; and that, therefore, said Acts in this instance deny to the plaintiff the equal protection of the laws and deprive him of his property without due process of law contrary to the provisions of the Fourteenth

Amendment to the Constitution of the United States. District Clerk's Record, pp. 21-26, (Sup. Ct. Record, p.....).

Plaintiff made application for an interlocutory injunction to restrain the defendants as aforesaid, pending a hearing on the merits. A temporary restraining order was issued, and the District Judge summoned a Circuit Judge and another District Judge to his aid, for the purpose of hearing an application for an interlocutory injunction, in compliance with Section 266 of the Judicial Code as amended. District Clerk's Record, p. 29 (Sup. Ct. Record, p.....).

Upon hearing the application for the interlocutory injunction, the District Court composed of the three Judges as aforesaid, denied plaintiff's claim for an interlocutory injunction, dissolved the temporary restraining order thereinbefore issued, and dismissed plaintiff's bill of complaint, all in the decree entered by the Court below, on the 25th day of June, A. D. 1929. District Clerk's Record, p. 112 (Sup. Ct. Record, p.....). Plaintiff below presented his application for the allowance of an appeal from said order, to the District Court, on the 24th day of July, A. D. 1929. District Clerk's Record, p. 123 (Sup. Ct. Record, p.....). This appeal was allowed and duly perfected.

The jurisdiction of the District Court below to entertain plaintiff's bill of complaint for the purposes herein stated is too well established to be questioned. *Ex Parte Young,* 209 U. S., 123; *Wells Fargo & Co. vs. Taylor,* 254 U. S., 175; *Hopkins vs. Clemson College,* 221 U. S., 637.

(b) The Supreme Court of the United States has jurisdicition to review on appeal an order by a District Court composed of three judges, granting or denying an interlocutory injunction, to suspend or restrain the operation of a state statute, because of its alleged unconstitutionality, and this Court has jurisdiction also to review the final decree made in a District Court composed of the three judges at the final hearing by virtue of Section 266 of the Judicial Code as amended.

This suit was instituted to suspend and restrain the enforcement, operation and execution of various statutes of the State of Michigan, by restraining the action of the State Highway Commissioner, the Detroit, Grand Haven & Milwaukee Railway Company, and the H. W. Nelson Company, in the enforcement or execution of the statutes and contracts made in accordance with and pursuant thereto, because such statutes were in conflict with the Fourteenth Amendment to the Constitution of the United States.

Appellant seeks a direct review by the Supreme Court of the United States, of the order and decree entered by the District Court as aforesaid, which reads as follows:

> "At a Session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournments at the District Court Room, in the City of Detroit, in said District, on Tuesday, the Twenty-fifth day of June, in the Year of Our Lord One Thousand Nine Hundred and Twenty-Nine.
>
> Present: The Honorable Arthur J. Tuttle,
> United States District Judge;
>
> The Honorable Charles C. Simons,
> United States District Judge;
>
> The Honorable Edward J. Moinet,
> United States District Judge.

FRANK H. DOHANY, vs. FRANK F. ROGERS, State Highway Commissioner, et al.	By: TUTTLE J. IN EQUITY No. 3118

"The Order to Show Cause heretofore issued herein, and Motion to dismiss Bill of Complaint, having been heretofore duly argued and submitted and the Court having taken time for mature deliberation thereon, and being fully advised in the premises, do now here Order, Adjudge, and Decree that the Restraining Order heretofore issued herein, be, and the same is hereby vacated and set aside, and Bill of Complaint dismissed, for reasons set forth in the written Opinion this day filed herein."

From that part of the Order and Decree denying the application for an interlocutory injunction after notice and hearing, appellant claims the right to a direct review by this Court by virute of the language of Section 266 of the Judicial Code as amended (U. S. C. Title 28, Sec. 380) which reads as follows:

"Appeal may be taken direct to the Supreme Court of the United States from an order granting or denying, after notice and hearing, an interlocutory injunction in such case."

From that part of the Order dismissing plaintiff's bill of complant which in fact was a final decree in the case, plaintiff also appeals by virtue of the right to such appeal given him by the further provisions of Section 266 of the Judicial Code as amended (U. S. C. Title 28, Sec. 380) which reads as follows:

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the District Court; and a direct appeal to the Supreme Court may be taken from the final decree granting or denying a permanent injunction in such suit."

By dismissing the bill of complaint, the Court entered a final decree in the case, and in so doing thereby denied a permanent injunction.

Appellant's right to a direct appeal to the Supreme Court of the United States from the decree of the District Court below is further made certain by Section 238 of the Judicial Code as amended (U. S. C. Title 28, Sec. 345). The language of this section applicable to the case at bar reads as follows:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in the following sections and not otherwise: (3) Section 380 of this Title (Sec. 266 of the Judicial Code as amended)."

(c) The appellant cites the following cases to sustain the jurisdiction of the Supreme Court of the United States to review the decree below, on direct appeal to this Court from the District Court: *Cumberland Telephone & Telegraph Co. vs. Louisiana Public Service Commission, et al,* 260 U. S., 212; *Interstate Busses Corporation vs. Blodgett, et al,* 276 U. S., 249; *Clark vs. Poor,* 274 U. S., 554.

(d) The Circuit Court of Appeals has no jurisdiction to review by appeal, a decree of the District Court, where there is a right to a direct appeal to the Supreme Court of the United States.

By dismissing the Bill of Complaint the District Court below made a final decision in the case. From that decision the right of appeal lies to the Supreme Court of the United States. Where such right of appeal exists, to that Court, there is no such right of appeal to the Circuit Court of Appeals, because of the provisions of the Judicial Code, Section 128 as amended (U. S. C. Title 28, Sec. 225) as follows:

> "(a) Review of final decisions. The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions:
>
> First: In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

U. S. C. Title 28, Section 345, hereinbefore quoted, gives the right to direct appeal to the Supreme Court in cases arising under the provisions of U. S. C. Title 28, Section 380, and direct appeal from a decree in a District Court to the Supreme Court is provided for therein. Therefore, the Circuit Court of Appeals has no jurisdiction to entertain an appeal in the case at bar. The only appeal to which the appellant herein is entitled is one direct to the Supreme Court of the United States.

For the reasons herein stated, the appellant prays that this Court take jurisdiction of the case on appeal, and determine the points therein raised as the ends of justice may require.

FRANK H. DOHANY, *in pro per,*
Solicitor for Appellant.

Dated: August 29, 1929.

Business address:
1021-23 Hammond Building,

APPELLANTS' BRIEF

FILE COPY

JAN 15 19
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 338

FRANK H. DOHANY,

Appellant,

vs.

FRANK F. ROGERS, State Highway Commissioner for the State of Michigan, et al,

Appellees.

Brief of Appellant, Frank H. Dohany

FRANK H. DOHANY, *pro se,*
1021-23 Hammond Building,
Detroit, Michigan.

CONWAY-SCOTT COMPANY, LAW PRINTERS, DETROIT, MICH.

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 338

FRANK H. DOHANY,

Appellant,

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FRANK F. ROGERS, State Highway Commissioner for the State of Michigan, et al,

Appellees.

Brief of Appellant, Frank H. Dohany

FRANK H. DOHANY, *pro se,*
1021-23 Hammond Building,
Detroit, Michigan.

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Supreme Court of the United States

OCTOBER TERM, 1929.

FRANK H. DOHANY, *Appellant,* *vs.* FRANK F. ROGERS, State Highway Commissioner for the State of Michigan, THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, a Michigan Corporation, and THE H. W. NELSON COMPANY, of Chicago, Illinois, a Foreign Corporation, *Appellees.*	In Equity No. 338.

Brief of Appellant, Frank H. Dohany

I.

OPINION OF THE COURT BELOW

The opinion in the District Court of the United States for the Eastern District of Michigan, Southern Division, in this case, is reported in Dohany vs. Rogers, et al., 33 Fed. (2d), 918.

II.

JURISDICTION

Forty copies of a concise statement of the grounds on which the jurisdiction of this Court is invoked, have been filed with the Clerk of this Court in compliance with Paragraph 1, of Rule 12 of the Supreme Court Rules.

III.

STATEMENT OF THE CASE

After a series of negotiations between the Detroit, Grand Haven & Milwaukee Railway Company and the officers of the State of Michigan, an agreement was reached, wherein the State of Michigan bargained to procure by purchase or condemnation a strip of land 9.1 miles in length lying in Oakland County, Michigan, and to locate thereon the main line tracks and yards of the Appellee, Detroit, Grand Haven & Milwaukee Railway Company, lying between its Mile Posts No. 13 and No. 22.1, in consideration whereof the Detroit, Grand Haven & Milwaukee Railway Company agreed to surrender to the State its special charter—contract with the State, and to thereafter re-incorporate under the provisions of the general railroad laws of the State, and to become subject to the general tax laws of the State. Said railway company further agreed to surrender and deliver up to the State a portion of its railroad right of way 5¼ miles in length, lying adjacent to the Easterly side of State Trunk Line Highway U. S. No. 10, known as Woodward Avenue.

The Legislature passed Act 215 of the Public Acts of 1925 in order to allow the State to condemn property, through the State Highway Commissioner, to be traded by him to a railroad company, in cases similar to this.

The contract between the State of Michigan and the Detroit, Grand Haven & Milwaukee Railway Company as outlined above, was authorized by the State Legislature in Act 340 of the Public Acts of 1927, and a copy of the proposed contract, containing the terms and conditions was embodied in Section 10 of said Act 340.

Appellant is the owner of lands situated in Section 31, Troy Township, Oakland County, Michigan. On April 6th, A. D. 1928, the Appellant received a notice through the mail from Appellee Frank F. Rogers, State Highway Commissioner for the State of Michigan, to the effect that he proposed to condemn a strip of land three hundred (300) feet wide through the tract owned by Appellant, to be traded to the Appellee Detroit, Grand Haven & Milwaukee Railway Company to be used for railroad purposes in the building of tracks and yards, and that he was condemning Appellant's property by virtue of Act 340 of the Public Acts of 1927 of the State of Michigan, and that a hearing would be had in the City of Royal Oak, on April 14th, A. D. 1928 in pursuance thereto. Said notice also contained a description of the property sought to be obtained (R-3).

On the said 14th day of April, A. D. 1928, a hearing was had and proofs were taken, from which it appeared that the property of the Appellant was ¾ of a mile distant from Woodward Avenue, which it was sought to widen and improve. That said Appellee, Frank F. Rogers, also announced that the proceedings were had and conducted in conformity with the "Highway Condemnation Law," being Act 352 of the Public Acts of 1925 as amended by Act 92 of the Public Acts of 1927 of Michigan, and by authority of Act 215 of the Public Acts of 1925, rather than in conformity with the "Railway Condemnation Law," being Sections 8249 et seq. of the Compiled Laws of 1915 of Michigan; that said "Highway Condemnation Act" permits the allowance and awarding of damages to the owner only for land actually taken for highway purposes, and does not authorize the allowance of any consequential damages, or damages for a diminution of the value of the remainder of the tract of land from which said land for right of way purposes is taken (R-6).

The proofs adduced by said State Highway Commissioner further disclosed that the railroad yards and approximately twelve tracks would cross the land of the Appellant at an acute angle three hundred (300) feet wide and at an elevation of twelve (12) feet above the ground; that the yards adjoining the main tracks would be four thousand (4,000) feet in length, and would prevent the opening of any streets between said Woodward Avenue and the lands of Appellant lying Easterly of said tracks; that the only way of reaching said Woodward Avenue would be by way of either Maple Avenue or Clawson Road, which are the Northerly and Southerly boundaries of said Section 31, and are one mile apart; that the shutting off of approach to Appellant's lands from Woodward Avenue would greatly diminish its value, and retard its salability for residential purposes; that in the making up and breaking up of trains in said yards and in the passing and re-passing of trains on the main line tracks there would be a great quantity of smoke, cinders, dust, steam, noise and vibration and other damaging features to the surrounding territory (R-7).

On the 19th day of April, A. D. 1928, the Appellee, Frank F. Rogers proceeding in conformity with said "Highway Condemnation Law" filed his written Determination in which he found that it was necessary to take a strip of land three hundred (300) feet wide, consisting of 7.60 acres, through the tract owned by Appellant, and awarded Appellant Three Thousand Two Hundred Fifty ($3,250) Dollars per acre for the 7.60 acres of land taken from him, which was a nominal sum far under the true value, but made no award or offer of consequential damages for the depreciation in value of the remainder of the tract (R-7).

Appellant acquired said tract of land approximately fourteen (14) years ago with a view of retaining the same until the time would arrive when said property would become of value for residential subdivision purposes through the growth and development of the Cities of Detroit and Royal Oak, and the Village of Birmingham; and he has never received one cent of income from the property since he acquired it, but on the contrary has expended many thousands of dollars for taxes and improvements, and practically all of the surrounding and adjoining property has been platted and lots sold under restrictions for residential purposes. Many high class residences have been constructed on lands adjoining Appellant's, and he intended to plat and sell his property for the same purposes in the immediate future, but the residential utility will be wholly destroyed by the construction of the main line tracks and railroad yards of the Detroit, Grand Haven & Milwaukee Railway Company through his premises and the value of same will therefore be diminished to the extent of One Hundred Thousand ($100,000.00) Dollars and upwards (R-11).

Pursuant to the provisions of Section 6 of said "Highway Condemnation Act" said Appellee, Frank F. Rogers, immediately thereafter took possession, and claimed title to the 7.60 acres of Appellant's land, and together with the Appellee, Detroit, Grand Haven & Milwaukee Railway Company, entered into a contract with the Appellee, the H. W. Nelson Company of Chicago, Illinois, for the construction of said railway and railway yards, grading, road bed tracks, etc. and all of the Appellees since that time have been in control and possession of the property, and have cut standing timber thereon, and have been grading and building tracks and trestles thereon, and have been crossing and re-crossing the land of Appellant, all without

having made any award or offer of consequential damages, or damages for the diminution of the value to the remainder of the tract of Appellant's land, and before any payment of any kind was made to the Appellant for the taking of his property (R-11), (R-16).

Appellant filed his Bill of Complaint in the Court below (U. S. District Court for the Eastern District of Michigan, Southern Division) to restrain Frank F. Rogers and the Detroit, Grand Haven & Milwaukee Railway Company from further continuing with the proceedings in the Probate Court for Oakland County, Michigan, being File No. 23,548, to condemn his lands and to further restrain the trespass on his property by all of the aforesaid Appellees, it being Appellant's claim that his property is being taken and damaged in violation of his rights guaranteed by the Fourteenth Amendment to the Federal Constitution.

Appellant made application for an interlocutory injunction under 28 U. S. C., Ses. 380 (Judicial Code, Sec. 266 as amended), to remain in force until a hearing could be had on the merits of the case. A temporary restraining order was issued pending the hearing and determination of the application for the interlocutory injunction (R-22).

All of the Appellees moved to dismiss the Bill of Complaint, which motions were all brought on and heard by the three Judge statutory Court along with Appellant's application for the interlocutory injunction. At this hearing no testimony was taken. The Court held generally against Appellant's contentions raised in his Bill of Complaint, and an order was entered thereafter by District Judge Tuttle, one of the Judges who sat at the hearing. The order vacated and set aside the temporary restraining order formerly issued, failed to grant the interlocutory

injunction prayed for, and dismissed Appellant's Bill of Complaint.

Appellant now brings the case to this Court by direct appeal from the District Court by authority of the provisions of 28 U. S. C., Sec. 380.

CLAIMS OF APPELLANT

Appellant's claims, which are more fully discussed in the argument, may be divided into four general groups as follows:

1. That the three Judge statutory Court below had no jurisdiction to entertain Appellee's motion to dismiss the Bill of Complaint at the hearing on Appellant's application for an interlocutory injunction, and that the single District Judge entered the decree dismissing the Bill without the proper assent or authority from the other Judges.

2. That there is no underlying need or necessity for the State to take Appellant's property through the power of eminent domain, for the purpose of trading it for a railway company's charter and a strip of property along the highway three-fourths of a mile distant from the property which is being condemned (R-19).

3. That the taking of Appellant's property by the State solely for trading purposes, in compliance with a private contract entered into between the State and the Detroit, Grand Haven & Milwaukee Railway Company is not a taking for a public use, but is a taking for a private use, thereby depriving Appellant of his property without due process of law, and denying to him the equal protection of the laws (R-19).

4. That the statutory means and methods employed by the State, through its agents, to condemn Appellant's property, deprive him of his property without due process of law, and deny to him the equal protection of the laws, as more particularly hereinafter set forth (R-12 to 22 inclusive).

IV.

APPELLANT'S ASSIGNMENTS OF ERROR

1.

The Court erred in refusing to grant an interlocutory injunction pending a hearing on the merits of the case.

2.

The Court erred in its finding that plaintiff had not been deprived of his property without due process of law.

3.

The Court erred in its finding that plaintiff had not been denied the equal protection of the laws.

4.

The Court erred in dismissing plaintiff's bill of complaint.

5.

The Court erred in entertaining the defendants' motions to dismiss plaintiff's bill of complaint at the three judge statutory hearing, because the three judges comprising such tribunal were convened for the single purpose of granting or denying plaintiff's motion for an interlocutory injunction, and were without jurisdiction to hear such mo-

tions to dismiss or to enter a final decree dismissing plaintiff's bill of complaint.

6.

The Court erred in vacating the temporary restraining order theretofore issued in the case, there being no jurisdiction to dissolve such restraiining order.

7.

The Court erred in entering the order and decree dismissing plaintiff's bill, vacating the restraining order and refusing to grant plaintiff's application for an interlocutory injunction, because District Judge Tuttle was without jurisdiction to enter such order and decree, the three judges comprising the tribunal who heard plaintiff's motion for an interlocutory injunction having not evidenced their assent thereto by their signatures or by their announcement in open court with such three judges sitting and directing the tested order and decree.

8.

The Court erred in failing to find that Act 215, of the Public Acts of 1925, of Michigan, is void, because it denies to the plaintiff the equal protection of the laws and deprives him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

9.

The Court erred in failing to find that Act 340, of the Public Acts of 1927, of Michigan, is void, because it denies to the plaintiff the equal protection of the laws and deprives him of his property without due process of law,

contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

10.

The Court erred in failing to find that Act 352, of the Public Acts of 1925, as amended by, Act 92, of the Public Acts of 1927, of Michigan, is void because it denies to the plaintiff the equal protection of the laws and deprives him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

11.

The Court erred in failing to find that Section 2 of Act 215, of the Public Acts of 1925, of Michigan, was void, because it allowed the State Highway Commissioner to launch his condemnation proceedings in a highway condemnation tribunal instead of a railway condemnation tribunal, thereby depriving plaintiff of the equal access to the railway condemnation tribunal, as enjoyed by all others similarly situated, and thereby denying to the plaintiff the equal protection of the laws.

12.

The Court erred in failing to find that Section 2 of Act 215, of the Public Acts of 1925, of Michigan, specifically authorized the State Highway Commissioner to deny to the plaintiff the equal protection of the laws by allowing him to arbitrarily select either the general highway condemnation act, or the public corporation and state agencies condemnation act, under which to proceed to condemn plaintiff's property.

13.

The Court erred in failing to find that Section 2 of Act 215, of the Public Acts of 1925, of Michigan, allowed arbitrary selection and classification by a state administrative officer, thereby denying to plaintiff the equal protection of the laws.

14.

The Court erred in failing to find that Section 4 of Act 340, of the Public Acts of 1927, of Michigan, authorized the State Highway Commissioner to institute proceedings to condemn plaintiff's property in accordance with the general laws of the State, not designating which general condemnation law, but allowing the State Highway Commissioner to arbitrarily select the general law under which he desired to proceed, thereby denying to the plaintiff the equal protection of the laws.

15.

The Court erred in failing to find that, even though Act 352, of the laws of 1925, as amended by Act 92, of the laws of 1927, of Michigan, be fair on its face, and impartial in appearance yet, in this case, it is being applied and administered by the State Highway Commissioner, one of the defendants, with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between plaintiff and others in similar circumstances, that the proceedings under it are void, and that said defendant should be restrained from continuing such proceedings.

16.

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, allowed the State Highway Commissioner to arbitrarily discriminate against

plaintiff in invoking proceedings under any one of the many general condemnation laws of the state, thereby denying to plaintiff equal protection of the laws.

17.

The Court erred in its failure to find that, the action of the State Highway Commissioner denied plaintiff the equal protection of the laws by arbitrarily selecting the "highway condemnation statute," under which to institute proceedings, instead of the "railway condemnation act" or the public corporations and state agencies act.

18.

The Court erred in its failure to find that Section 2 of Act 215, of the Public Acts of 1925, of Michigan, specifically authorized the State Highway Commissioner to arbitrarily select as to whether he would invoke the liberal terms of the public corporations and state agencies act, or whether he would proceed under the stringent highway condemnation act, thereby allowing arbitrary selection in the enforcement of the laws, and denying plaintiff the equal protection of the laws.

19.

The Court erred in its failure to find that Section 4 of Act 340, of the Public Acts of 1927, of Michigan, authorized arbitrary selection, not based upon a finding or judicial determination, on the part of the State Highway Commissioner, in choosing a condemnation law, under which to proceed, thereby denying plaintiff the equal protection of the laws.

20.

The Court erred in its failure to find the method used by the State Highway Commissioner in carrying out the pro-

visions of Act 340, of the Public Acts of 1927, of Michigan, denied plaintiff the equal protection of the laws and deprived him of property without due process of law.

21.

The Court erred in its failure to find that a law authorizing arbitrary selection by an administrative officer in carrying out the laws, was void upon its face.

22.

The Court erred in its failure to find that one of the tests as to whether Section 2 of Act 215, of the Public Acts of 1925, of Michigan, denied plaintiff the equal protection of the laws, was whether or not the condemnation acts therein designated provided for different elements and measures of damages.

23.

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, set up no process of law, but allowed the highway commissioner to select any one of many condemnation processes, thereby denying plaintiff that equal protection of the law and the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution.

24.

The Court erred in its finding that Act 352, of the Public Acts of 1925, as amended by Act 92, of the Public Acts of 1927, of Michigan, prescribed procedure applicable to taking land to be used for railroad purposes.

25.

The Court erred in failing to find that if such highway acts provide such a taking of property for railway purposes, then there are two or more general laws applicable to such taking, each prescribing different procedure and each allowing different measures of damages contrary to the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

26.

The Court erred in its failure to find that when there are two or more laws applicable to the taking of private property for public use, each law providing for different processes, safeguards, privileges and immunities, and each law providing for a different measure of damages, and, that, when an administrative officer elects to proceed to condemn lands under the act allowing the fewest safeguards, privileges and immunities, and the smallest measure of damages, then such action denies the landowner the equal protection of the laws.

27.

The Court erred in its finding that the ultimate use to which the property was to be put was not the factor which should designate the type of condemnation proceedings, or the tribunal in which it should be launched.

28.

The Court erred in finding that the taking in this case, by the State, of private property, to be traded to another for railway purposes, and pursuant to a contract was a public use.

29.

The Court erred in its failure to find that the taking of the property for trading purposes was a taking of private property for a private use, thereby depriving plaintiff of his property without due process of law.

30.

The Court erred in its finding that the taking of private property by the State to be traded to a railway company, which railway company had the right to exercise the power of eminent domain within itself, was a taking for a public use.

31.

The Court erred in its finding that the taking of plaintiff's property upon which a railroad is to be located was a taking for public highway purposes.

32.

The Court erred in its finding that the re-location of the Grand Trunk railway tracks was so closely connected with the public highway project as to justify the taking of plaintiff's land under the highway act.

33.

The Court erred in its finding that it was necessary to re-locate the railway tracks by the State in any case; there being power in the railway company for that purpose.

34.

The Court erred in its finding that the taking of plaintiff's property under the highway act, by the State, for the purpose of trading such property to the railway com-

pany for railway purposes did not deprive plaintiff of his property without due process of law now deny him the equal protection of the laws.

35.

The Court erred in its finding that the re-location of the railway tracks was a part of the public highway project.

36.

The Court erred in its finding that this case was governed by the principles of law laid down in the case of *Brown vs. United States*, 263 U. S. 78.

37.

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, arbitrarily selected certain property owners from a general class, thereby denying them the equal protection of the general laws of the State of Michigan, contrary to the equality clause of the Fourteenth Amendment to our Federal Constitution.

38.

The Court erred in its failure to find that Act 340, of the Public Acts of 1927, of Michigan, arbitrarily withdrew plaintiff from the general class of persons whose property is condemned for railway purposes, thereby denying him the equal protection of the laws.

39.

The Court erred in its finding that the State had authority to exercise its own discretion and judgment in adopting methods of the enforcement of the power of eminent

domain regardless of the general laws of the State. Such exercise of discretion being a denial to the plaintiff of the equal protection of the laws.

40.

The Court erred in its failure to find that the State of Michigan cast away its mantle of sovereignty, and became the agent of the railway company, when said State entered into a contract, thereby undertaking to acquire land upon which to relocate the tracks of said railway company, by purchase or condemnation, pursuant to Act 340, of the Public Acts of 1927, of Michigan.

41.

The Court erred in its failure to find that the State could not prescribe special laws to be used by it in taking private property for railway purposes, which laws were not applicable to all such proceedings to take property for railway purposes.

42.

The Court erred in its failure to find that the State, by depriving plaintiff of the right to demand a jury trial, which right is enjoyed by all others whose property is taken for railway purposes, thereby denied plaintiff the equal protection of the laws.

43.

The Court erred in its failure to find that the denying of attorney fees and expenses and right of general appeal to our Supreme Court to plaintiff, while allowing them to all other persons whose property is taken for railway purposes, denied plaintiff the equal protection of the laws.

44.

The Court erred in its failure to find that Section 4 of Act 340, of the Public Acts of 1927, of Michigan, legislatively declared the taking of plaintiff's property to be a public necessity, contrary to the Constitution and adjudicated cases of Michigan, thereby denying to the plaintiff the equal protection of those fundamental provisions enjoyed by all others whose property is taken for public use, contrary to the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

45.

The Court erred in its finding that plaintiff would receive that measure of compensation guaranteed by the equality clause of the Fourteenth Amendment to the Federal Constitution, although the benefits accruing by virtue of the public enterprise will be assessed and deducted from plaintiff's award, while in no other case under similar circumstances could such deduction of benefits from the award be made.

All of the assigned errors are intended to be urged and relied upon by Appellant.

V.

ARGUMENT

The Three Judge Statutory Court Below Had No Jurisdiction To Entertain Appellees' Motion To Dismiss

As stated before, Appellant made application in the Court below for an interlocutory injunction pending a hearing on the merits of the case. Appellees also brought on their motions to dismiss Appellant's Bill, and these mo-

tions were heard along with the application for the interlocutory injunction.

The Court, as composed, had jurisdiction only to pass upon the application for the interloctuory injunction. It was created for no other purpose. The statute (Judicial Code 266 as amended) authorizes this tribunal to hear and determine the application for the interlocutory injunction. No authority is given this tribunal to entertain, hear, or pass upon a motion to dismiss, brought on for hearing at the same time. This power is purely statutory, and must be strictly limited and construed.

In the case of *Crane vs. Johnson,* 233 Fed. 334 (1916) three Judges were called under Sec. 266 of the Code to pass upon the granting or withholding of an interlocutory injunction. A motion to dismiss was also made by the defendant. The Court refused to grant the interlocutory injunction, but at the same time it also declined to consider or pass upon the merits of the case after having refused to grant the injunction, and in so doing spoke as follows:

> "We do not understand that, upon such an application as the present, the Court, composed, under statutory requirements, of the District Judge, of another District Judge, and a Circuit Judge, is called upon, if indeed, authorized, to decide the merits of the suit."

Brown Drug Company vs. United States, 236 Fed. 603 was a case arising under Compiled Statutes 1913, Sec. 997, which are similar to Sec. 266 of the Code wherein a three Judge statutory Court was convened to hear a motion for an interlocutory injunction to enjoin interstate commerce rates. A motion was filed to dismiss Plaintiff's bill of complaint, and came on for hearing along with the motion for a temporary injunction. In refusing Defendant's motion to dismiss, the Court spoke as follows:

"A motion is made by the express companies to dismiss this case. This motion in my judgment, could not be heard before the three Judges now sitting. The three Judges are convened to hear the application for a temporary writ of injunction, not to determine whether the case should be dismissed upon its merits."

The Single District Judge Below Had No Authority To Enter A Decree

Sometime after the hearing was had on Appellant's application for the interlocutory injunction and Appellees' motions to dismiss, the District Judge, Tuttle, being one of the three Judges present at the hearing, entered the decree in this case below. It is signed by him alone, and does not purport to be authorized or sanctioned by either or both of the other two Judges who heard the case. The decree, of course, was not announced at any time in open Court. The learned Judge certainly exceeded his jurisdiction when he entered this decree.

In the case of *Cumberland Telephone & Telegraph Co. vs. Louisiana Public Service Commission, et al,* 260 U. S. 212 (1922) this Court had occasion to consider the jurisdiction of a District Judge to enter a decree or order in behalf of the three Judge statutory Court, after hearing. In that case, as in the case at bar, the three Judges had been convened to hear an application for an interlocutory injunction. Sometime after the hearing one of the District Judges who sat in the case, acting upon authority in the nature of a letter received from the Circuit Judge, entered an order granting a supersedeas. This Court, through Mr. Chief Justice Taft, spoke as follows in this regard:

"The letter was not an attempt by Judge Bryan to become a participant in the order. Nor is there

> any showing that Judge Clayton took part in the matter. A discussion in conference of the Judges as to the granting of an injunction pending an appeal before it was applied for does not supply what is needed to give efficacy to such order by a single Judge. *Compliance with the Statutes requires the assent of the three Judges given after the application is made, evidenced by their signatures or an announcement in open court, with three Judges sitting, followed by a formal order tested as they direct.*"

The decree below was not announced in open Court, was not signed by the three Judges participating at the hearing, and there is no showing in the record that the Court thus composed authorized or directed the single District Judge to enter a decree tested by himself. Appellant therefore submits that the Court below had no jurisdiction to dismiss his Bill of Complaint, and that the order dismissing it was entered without the proper authority.

Furthermore, the decree below entered by the District Judge stated that the "restraining order heretofore issued herein, be, and the same is hereby vacated and set aside." In *Cumberland Telephone & Telegraph Company vs. Louisiana Public Service Commission,* supra, the Court affirmed the rule that the District Judge had no jurisdiction to set aside a temporary restraining order granted before by himself in the case. The Court spoke as follows:

> "After a District Judge has granted a preliminary restraining order in such a case as provided, the same Judge could not set aside his own order; and such act by him was without jurisdiction."

The Court below was clearly in error in setting aside the temporary restraining order, as it had no jurisdiction for that purpose.

Appellant Has Been Deprived of His Property Without Due Process of Law, and Has Been Denied the Equal Protection of the Laws

The general purpose of the State in the taking of Appellant's land by eminent domain under the terms and provisions of Act 340 of the Public Acts of 1927 of Michigan is to turn said property over to the Detroit, Grand Haven & Milwaukee Railway Company for the purpose of the construction of a new railroad thereon. In the contract embodied in Act 340 the Railway Company has agreed to reimburse the State of Michigan for the money expended in the acquisition of the new railway right of way. The State of Michigan is acquiring the property by condemnation in the first instance, for the sole purpose of trading it to the Railway Company, pursuant to the contract. The State has no authority to operate a railroad, and in fact does not intend to do so. It is admitted that the State is not condemning the property for highway purposes. Appellant's property which is being taken is at least three-fourths of a mile from the highway sought to be widened, known as Woodward Avenue. It is very clear, therefore, that the State is procuring the property for neither highway nor railway purposes.

There is a "General Railway Condemnation Act" (C. L. 1915, Sec. 8249 et seq.) in force and effect in the State of Michigan through which any railroad company is empowered and authorized to condemn property for railway purposes. There is also a "General Highway Condemnation Act" which may be used by State officers when condemning property to be used for highway purposes. This act is known as the "Highway Condemnation Act" being Act 352 of the Public Acts of 1925 as amended by Act 92 of the Public Acts of 1927 of Michigan. These two con-

demnation laws provide for entirely different procedure to be used in the condemning of property, and also allow different measures of damages to be paid to the property owner for the property taken and damaged. There is also another general condemnation law which is known as the "Public Corporations and State Agencies Condemnation Act" being Sec. 353 of the C. L. of 1915 of Michigan. This latter Act is quite similar to the "Railway Condemnation Act" in the procedure authorized and the measure of damages allowed to the property owner. The "Railway Condemnation Act" and the "Public Corporations and State Agencies Act" provide for a liberal procedure on the part of the property owner, and allow him a much greater measure of damages than does the "Highway Condemnation Act."

In choosing the "Highway Condemnation Act" the State Highway Commissioner thereby deprived Appellant of procedural rights which he would have enjoyed, and deprived him of damages which he would have received if his property had been condemned in accordance with either the "Railway Condemnation Act" or the "Public Corporations and State Agencies Act." It is the Appellant's claim that in this way the State is infringing his constitutional rights guaranteed by Amendment Fourteen, Section 1, of the Federal Constitution, which reads as follows:

> "* * * Nor shall any State deprive any person, of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This clause means "that there can be no proceeding against life, liberty or property, which may result in the deprivation of any of these without the observance of

those general rules established in our system of jurisprudence for the security of private rights." *Hager vs. Reclamation District*, 111 U. S. 708.

Due process of law is secured by laws bearing on all alike, and not subjecting the individual to the arbitrary exercise of the powers of Government unrestrained by the established principles of private right and distributive justice. *Caldwell vs. Texas*, 137 U. S. 697; *Duncan vs. Missouri*, 152 U. S. 382. It has also been described as "the law of the land." *Hurtado vs. California*, 110 U. S. 535.

In addition to securing to every individual within the State, due process of law, the aforesaid provision goes a step farther and prohibits unequal discrimination by the States by declaring that no State shall deny to any person the equal protection of the laws. The extent and operation of this protective provision in our Constitution has been many times declared and applied. This Court had occasion to make exhaustive comment on the "equal protection" provision in the case of *Truax vs. Corrigan*, 257 U. S. 312. We quote the language of Mr. Chief Justice Taft from that case as follows:

> "The due process clause requires, that every man shall have the protection of his day in court, and the benefit of the general laws, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."
>
> "Our whole system of the law is predicated on the general fundamental principle of equality of application of the law."

"The equality clause of the 14th Amendment was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality on the other."

"It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

"Class legislation, discriminating against some and favoring others, is prohibited."

"And legislation, which is limited in its application and does not affect equally all persons similarly situated, is prohibited by the Amendment."

"The guaranty was intended to secure equality of protection not only for all but against all similarly situated."

"Immunity granted to a class however limited, having the effect to deprive another class however limited, of a personal or property right, is clearly a denial of equal protection of the laws."

"These provisions are universal in their application. The equal protection of the laws is a pledge of the protection of equal laws."

"Equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights."

"All persons should have like access to the courts of the country for the protection of their persons and property."

"The equality clause prescribes that the law have the attribute of equality of operation."

Arbitrary Classification

Act 215 of the Public Acts of 1925 of Michigan provides that whenever the line of any railroad or railway com-

pany is upon or adjacent to the right of way to a trunk line highway, the State Highway Commissioner in his discretion may condemn other property, and trade it to the railway company for the right of way property adjacent to the highway, after he has entered into a contract with the railway company for that purpose.

This provision certainly is discriminatory. Then there is Sec. 2 of the above Act which declares that the State Highway Commissioner shall proceed to condemn the property desired for trading purposes in accordance with the procedure prescribed for proceedings instituted by Boards of County Road Commissioners (which procedure is the present "Highway Condemnation Act"), or the procedure provided for condemnation by "State Agencies and Public Corporations," (being the "Public Corporations and State Agencies Act." Comp. Laws, 1915, Sec. 353, et seq.).

By operation of Act 215, a small group of owners, whose property the State desires to condemn for the purpose of trading it to a railway company for railway use, is arbitrarily withdrawn from the general class of persons whose property could be taken for railway purposes under the "Railway Condemnation Act". The owners within this group are denied all of the benefits, privileges and immunities guaranteed by the "Railway Condemnation Act", which all other owners enjoy under similar circumstances. The general class of owners, whose property is desired for railway use, is divided into two groups. The property is taken in either case for railway purposes. There is certainly no basis for such arbitrary and capricious classification as this. In *Truax vs. Corrigan, supra,* it was said:

> "Classification must be based upon a real and substantial distinction, bearing a reasonable and

just relation to the things in respect to which such classification is imposed, and classification cannot be arbitrarily made without any substantial basis."

The simple fact that the State Highway Commissioner has entered into a contract with a railroad company to procure certain lands by condemnation, and thereafter turn the lands over to the railway company on a trade, is certainly no reason for placing the owner of such property into an arbitrary, unreasonable and oppressed class. When the railroad is located upon Appellant's property, he will suffer exactly the same amount of damages and will be subjected to exactly the same degree of inconvenience as the person whose property is condemned, for the same purpose, under the "Railway Condemnation Act." Such an arbitrary designation of a small group of persons, including the appellant, furnishes no reasonable basis for the purpose of classification. It is Appellant's contention that the purpose for which the land is taken, and for which it is to be used, or in other words, the character of the use, should be the determining factor on the question of what tribunal should be resorted to, and what damages Appellant is entitled to receive as his just compensation.

In view of the fact that the land sought to be taken is to be used for a railway right of way and yards, the Appellant should be entitled to the procedure allowed by the terms of the "Railway Condemnation Act" in a tribunal created under that law and Appellant should be entitled to damages allowed under the "Railway Condemnation Act," which requires the payment of consequential damages for the diminution of the value to the remainder of the tract and it does not allow the deduction of benefits.

In a case similar to the one at bar, the Legislature of Indiana attempted to arbitrarily designate characteristics of a certain Chautauqua Company and to delegate to this Company the power of eminent domain. The law appeared to be general upon its face, but was so limited in its scope that only one Chautauqua Company had the certain designated characteristics, so as to fall within the scope of the Act. In the case of *Fountain Park Company vs. Hensler,* 199 Ind. 95, (1926), the Supreme Court of the State of Indiana condemned the aforesaid statute as unreasonable, selective, arbitrary, and in derogation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution. Upon the question of arbitrary designation in the matter of classification, the Court spoke as follows:

> "One of the essential requirements in order that the classification may not violate the constitutional guaranty as to equal protection of the laws, is that it must be reasonable, and natural, and not capricious or arbitrary."
>
> "The law requires something more than a mere designation of characteristics which will serve to divide into groups. Arbitrary selection or mere identification cannot be justified by calling it classification (citing cases) (p. 102)."

Act 215 of the Public Acts of 1925 is meant to apply to one single project, which is the one to take lands for trading purposes between the Cities of Detroit and Pontiac. In no other case has Act 215 ever been applied. It selects a small group of persons from the general class whose property may be condemned for railroad purposes, and applies to this small group special and arbitrary laws. Act 340 of the Public Acts of 1927 was passed in conformity with Act 215 and circumscribed the few individuals

to be placed within the small group, and provided for the condemnation of their property in a special manner, and further provided for the trading and conveyance of the property to the Detroit, Grand Haven & Milwaukee Railway Company.

There is no contention that Act 340 of the Public Acts of 1927 is intended to apply throughout the State generally. It is admitted that its scope of application is pinned down to Appelant and a few other persons in the class with him.

Section 4 of Act 340 authorizes the taking of lands which are described in the contract, and authorizes the State Highway Commissioner to acquire the land on behalf of the State Highway Commissioner to acquire the land on behalf of the State by purchase or condemnation "in accordance with the general laws of the State of Michigan." The State Highway Commissioner proceeded with the condemnation of Appellant's property in accordance with Act 215 of the Public Acts of 1925, which the Highway Commissioner contends is a "general law of the State of Michigan."

It was said in *Fountain Park Company vs. Hensler, supra*:

> "A proper classification must embrace all who naturally belong to the class—all who possess a common disability, attribute, or qualification, and there must be some natural and substantial difference germane to the subject and purposes of the legislation between those within the class included and those whom it leaves untouched."

The State has attempted to condemn property to be eventually used for 9½ miles of railway right of way, under special laws which apply to no other person or

group of persons within the State. Applying the above rule, we find that there is no natural or substantial difference between Appelant, whose property will be taken and used for railway purposes, and all other persons within the State who enjoy the terms of the "Railway Condemnation Act" and whose property may be taken to be used for railway purposes. If the Railway Company should desire to extend its railway right of way, it would be required to employ the "Railway Condemnation Act." In such a case property owners in exactly the same situation as Appellant, and whose property was desired to be used for exactly the same purpose, would be entitled to a more favorable procedure and a greater amount of compensation than Appellant is getting in this case.

In *Connolly vs. Sewer Pipe Company,* 184 U. S. 540, the Court said:

> "Due process of law and the equal protection of the laws, this Court has said, are secured if the laws operate on all alike, and do not subject the individual to any arbitrary exercise of the powers of government."

In *Southern Railway Company vs. Greene,* 216 U. S. 400, it was said:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation" (p. 412).

In the case at bar, it will be seen that the real purpose of Act 340 of the Public Acts of 1927 is to withdraw Appellant from the operation of the general laws, and to place him under special laws.

In *Atchinson, etc. Railway Company vs. Vosburg,* 238 U. S. 56, the Kansas Statute bestowed upon a shipper,

rights which were not bestowed upon a railway. In declaring the Act void, the Court spoke as follows:

> "The Act, while recognizing the existence of such burden allows compensation for it in favor of one class of litigants, but does not allow like compensation to the other class when subjected to like burden. This in our opinion is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment" (p. 61).

The "Railway Condemnation Act" recognizes that greater burdens exist, when property is taken for railroad purposes, than when it is taken for highway purposes, and makes adequate provisions for these additional burdens. Act 340 attempts to withdraw these provisions from Appellant, by allowing his property to be taken under the provisions of the "Highway Condemnation Act" and thereby denies to him the equal protection of the laws.

Appellant submits, therefore, that the Court below was in error when it found that the classification affecting Appellant did not deny to him the equal protection of the laws (33 Fed. 2d 920).

In the case of *Cotting vs. Kansas City Stock Yards Company*, 183 U. S. 79, it is found that the State of Kansas passed a law regulating the charges of stockyards companies having a volume of business of $100,000.00 or more, and upon the number of head of live stock handled in a day. The limitation was made in such a manner as to apply to only the Kansas City Stock Yards Company. Holding that the statute denied to the Company the equal protection of the laws, the Court spoke as follows:

> "In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered, but simply on

> the amount of business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes and which is perfectly reasonable so far as the value of the services rendered to the individual seeking them is concerned, yet if by aggregation of business he is compelled to make large profits his charges may be cut down. * * * We must, nevertheless always remember that the equal protection of the laws is guaranteed and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast on the other."

The Statute was held unconstitutional.

Two or More Laws Applicable to the Same Subject Matter Under the Same Conditions

The Railway Condemnation law is applicable generally throughout the State when property is taken for railway purposes. There is no question but what that law could be applied properly for the taking of Appellant's property to be eventually used for railway purposes. Act 340, however, was passed thereby authorizing the application of Act 215 of the Public Acts of 1925 to the taking of Appellant's property, and thereby authorizing the State Highway Commissioner at his discretion to apply to the taking of Appellant's property the "Highway Condemnation Act," or the "Public Corporations and State Agencies Condemnation Act." This action by the State placed Appellant in a class whose property could be condemned by any one of the three aforesaid Condemnation laws, and in this way made three entirely different Acts applicable to the same taking, and the State Highway Commissioner chose to proceed in accordance with the "Highway Condemnation Act."

There is certainly no standard whereby due process of law may be measured in a condition like this. One process may be applied to one taking, another process may be applied in condemning other property, and still another process is available for the same kind of a taking, all under the same conditions. The State has deprived Appellant of that due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

In the case of *ex parte sizemore,* 8 S. W. 2d 134 (1928 Texas) the Court discussed the effect of two or more statutes applicable to any given case. There was a general road law operating throughout the state providing that a convict should be entitled to three dollars credit per day upon his sentence for work performed on the County Road. A local County Road Law was passed providing that in a certain County a convict should receive only fifty cents per day credit for his work. The Court used the following language in holding the statute void:

> "A law which makes different punishment follow the same identical criminal acts in the different political subdivisions of Texas violates both our State and Federal Constitutions. It fails to accord equal rights and equal protection of the law, and a conviction under it is not in due course of the law of the land."

Act 340 of the Public Acts of 1927 provides for the payment of a lesser amount of damages to Appellant whose property will undergo the same use as that taken from other persons by condemnation under the provisions of the "Railway Condemnation Act."

In the case of *Anderton vs. City of Milwaukee,* 82 Wis. 279, the Court considered a charter provision of the City

which provided that throughout the City generally land owners would be compensated for damages caused by change of grade by the City along streets adjacent to their property. One provision of the charter excepted an area of land comprising forty-nine blocks from the general provision, and denied to the persons within the forty-nine blocks the right to damages caused by change of grade. In condemning the discrimination against certain owners in the excepted area the Court spoke as follows:

> "If the Legislature had the power thus to take away from the lot owners in 49 particular blocks of the City, such right of property so permanently secured to them by the charter, and at the same time leave such charter rights unimpaired as to all other lot owners in the City, then the Legislature has the same power as to the lot owners in a single block or even as to the owner of a single lot in a single block. It is one of the purposes of the American constitutional law to prevent all such class legislation" (p. 284).
>
> "It attempts to make an arbitrary classification and distinction, in regard to such an established grade, between lots similarly situated and subject to the same or substantially the same conditions. This is certainly in violation of the constitutional provision quoted" (Equality Clause) (p. 285).

By the same token, it is just as discriminatory for the State Legislature to pick out a certain group of persons, including Appellant, between the Cities of Detroit and Pontiac, and apply to them special laws, as it would be if the Legislature segregated a single individual and attempted to deny to him privileges enjoyed by all other persons within the State.

In *Pearson vs. City of Portland*, 89 Me., 278, the Court had occasion to consider the constitutionality of a statute

which provided that a non-resident person who was injured by the negligence of another could recover only by showing the right to recover under the laws of his native State. There was a general law in effect in the State which allowed recovery in negligence cases. Holding that the statute denied to the non-resident the equal protection of the laws, the Court spoke as follows:

> "The general statute may undoubtedly be repealed; but the Court is of opinion that while it remains in force for the protection of one class of persons within the jurisdiction of the State, it must remain in force for the protection of all others similarly situated."

Appellant contends that as long as the "Railway Condemnation Act" remains un-repealed, its protection must remain in force for the protection of all persons whose property is being condemned for railway purposes. The Court below was in error when it ignored the aforesaid claim of Appellant.

Procedural Rights Which Have Been Denied To Appellant

The District Court below was of opinion that Appellant had no vested rights in procedural matters and therefore his rights of that nature were not protected by the equality clause of the Fourteenth Amendment. That has been the contention of the Appellees from the beginning of this case. It is obvious that the State Legislature may change or repeal the statutes regulating matters of procedure. It is Appellant's contention, however, that the State cannot repeal or nullify procedural rights as to some persons, while at the same time leaving these rights of procedure in full force and effect as to all other persons within the

State under the same or similar circumstances. In other words, Appellant claims that as long as the general procedural statutes of the "Railway Condemnation Act" remain un-repealed, that he should be entitled to access to them the same as all other persons within the State whose property is being condemned for railway purposes.

It was firmly established in the case of *Truax vs. Corrigan*, 257 U. S. 312, that where there is a right given to one to redress his wrongs, it must also be given equally to all other persons in the same circumstances. In that case it was held that the denial of equity procedure to a certain limited class was offensive to the equality clause of the Fourteenth Amendment.

In the late case of *Power Manufacturing Company vs. Saunders*, 274 U. S. 490 (1926), the Court had occasion to consider an Arkansas statute which denied procedural rights to foreign corporations doing business within the State. In that case it was contended that as to procedural matters there was no vested right and the State could use discrimination in granting such rights to some while withholding them from others. Condemning the statute as discriminatory, and violative of the equality clause, this Court spoke as follows:

> "It, of course, rests with the State to prescribe the venue of actions brought in her Courts. But, the exercise of this power as of all others, must be in keeping with the limitations which the Constitution of the United States places on State action. *Procedural statutes are not excepted, but must fall like others when in conflict with those limitations.* This is illustrated in a recent case where a statute of Arizona forbidding the granting of injunctions in certain situations was held to be in conflict with the equal protection clause of the Fourteenth Amendment, and invalid, notwithstanding a con-

tention that it was merely a procedural provision excluding a particular remedy in equity, but leaving remedies at law open. *Truax vs. Corrigan, supra,* pp. 322-330. Further illustration is found in a still later case where a Wisconsin statute subjecting foreign corporations to a burdensome procedural requirement not laid on other litigants was pronounced invalid under the same constitutional provision, *Kentucky Finance Corporation vs. Paramount Auto Exchange Corporation,* 262 U. S., 544."

There are many procedural rights under the "Railway Condemnation Act" which Appellant has been denied, by operation of Act 340 of the Public Acts of 1927, and Act 215 of the Public Acts of 1925, which acts authorize the condemnation of this property under the Highway Condemnation Act.

A contrast of the procedural rights (allowed to all other persons excepting Appellant) under the "Railway Condemnation Act" and rights allowed under the "Highway Condemnation Act" will be considered here.

1. *Jury Trial*—The "Railway Condemnation Act" (C. L. 1915, Sec. 8254) provides that when property is condemned for railway purposes the land owner may demand a jury trial in the Circuit Court. Under those conditions a Judge is present, whose duty it is to rule upon evidence and instruct the Jury as to the law of the case (C. L. 8255). It is the duty of the Jury to pass upon and determine both the question of the necessity for the taking, and to determine the amount of damages to be paid. The Respondent in the case has the right to challenge and excuse jurors making up the tribunal and of course conduct a voiredire examination of the jurors.

Under the "Highway Condemnation Act" (Act 352 of the Public Acts of 1925 as amended by Act 92 of the Public Acts of 1927) the State Highway Commissioner, who is the petitioner and one of the parties to the action, is empowered to conduct a hearing and to himself determine as to whether or not there is a necessity for the taking of the property (Sec. 4). After he has filed his determination of necessity, he then proceeds to file a Petition in the Probate Court for the appointment of three Commissioners whose duty it is to pass upon the amount of damages to be paid to the property owner. These Commissioners then proceed in ignorance of the rules of evidence and without the guidance of a Court or judicial officer to inform them of the elements to be considered in arriving at a proper award. A fair sample of the injustice inflicted upon property owners where their property was taken under the "Highway Condemnation Act" may be found by a review of *Rogers vs. Breisacher,* 231 Mich. 317; *Rogers vs. Vermander,* 242 Mich. 239; *Rogers vs. Boelter,* 242 Mich. 520.

The Probate Judge who instructs the Jury under the "Highway Condemnation Act" many times is not a lawyer, but his ruling upon the evidence is final. The Commissioners are judges of both the law and the facts of the case.

2. *Effort to Purchase*—Sec. 8249 of the "Railway Condemnation Act" requires that a bona fide effort to purchase the property before proceedings to condemn are started, without which the Court has no jurisdiction to proceed further.

Under Sec. 4 of the "Highway Condemnation Act" the declaration of the Commissioner that he

has been unable to agree with the owner, for the purchase of such property, and his determination of the necessity of the project and of taking the particular property described therefor, shall not thereafter be questioned.

3. *Vesting of Title*—Sec. 8249 of the "Railway Condemnation Act" provides that the award of compensation, damages, and a reasonable attorney fee shall be paid or deposited "before such Company shall have any right to enter upon or take possession of the lands condemned".

Sec. 6 of the "Highway Condemnation Act" provides that: "Upon the filing of such determination of necessity and the giving of notice * * * the title, and the right of possession to all of the property and property rights described in the determination shall vest in the State * * * for the purpose therein stated, * * * The Commissioner shall have full power and it shall be his duty to enter upon the premises with such aid and assistance as shall be necessary and remove such fence or fences, obstructions or encroachments without delay."

Appellant will be precluded from receiving attorney fees, witness fees, and other costs and disbursements because there is no provision in the "Highway Condemnation Act" for the allowance thereof, and the tribunal has no jurisdiction to award any amount for those items.

4. *Right of Appeal*—Sec. 8257 of the "Railway Condemnation Act" provides that either party who is aggrieved with the award of compensation may appeal to the Supreme Court of Michigan. Upon

such appeal the Sureme Court considers the case de novo upon both the law and the facts and renders a judgment accordingly.

The "Highway Condemnation Act" (Sec. 27) provides that a review upon the Determination of Necessity filed by the State Highway Commissioner shall be by certiorari within ten days after it is filed. Statutory certiorari is the only means of review which the land owner has to review the award of compensation. In such a proceeding as provided in either case, the Supreme Court is limited in its consideration to the regularity of the proceedings and regardless of how little the amount of damages awarded may be, the Court cannot disturb the judgment below if the proceedings were regular.

Our Supreme Court has spoken often of the importance of trial by jury in condemnation cases. An important expression of the Court's sentiment on this subject is as follows:

> "The change was made from a well founded belief, founded on experience, that private property was often taken improperly and without any necessity, and that the pretense of public utility was often a cloak for private aggrandizement. Ways were forced through private property to enrich the owners of other property, who were enabled by intrigues and sinister influence to induce municipal bodies to use the public authority to subserve their private schemes. The system was abused to the oppression of individuals by corruption and bargaining, and the sacredness of private property, and its immunity from any interference not required by actual public exigencies, ceased to be respected.

> The Constitution has changed this by requiring the whole subject to be determined by a jury of freeholders; so that each case shall be determined by a separate tribunal summoned expressly for the purpose, who must be unanimous in their views before any land can be taken; who must act openly and before all concerned, in hearing and receiving testimony; who cannot listen to private persuasion, and where any attempt to influence them will subject the offender to severe and disgraceful punishment. All these safeguards are implied in the use of the term 'jury'; and can be maintained, if any of these securities are impaired or disregarded. The functions of juries and the requisites of legislation in these cases have been passed upon frequently." See cases cited, page 114. *Paul vs. Detroit,* 32 Mich., page 108.

In Sec. 4 of Act 340 of the Public Acts of 1927, the Legislature went so far as to itself determine the necessity for the taking of Appellant's lands in the following language:

> "The changes and improvements contemplated by this Act and the said proposed contract, and the taking of the lands described in said contract, for the new right of way of said Railroad Company, including the additional lands described therein necessary for depot and yard purposes at Birmingham, and all other lands necessary or required to carry out this Act, and said proposed contract, are hereby declared to be a public necessity * * *."

Article 13, Sec. 1, 2 and 3 of the Constitution of Michigan of 1908, requires that in every case where private property is taken for public use, the necessity therefor shall be determined in a judicial proceeding, which requires due process of law. This is the uniform interpretation placed upon the provisions by the Court. In the case

of *Hendershott vs. Rogers,* 237 Mich. 344, interpreting the words added to the Constitution, the Court spoke as follows:

> "They (the makers of our later Constitution) added the words to make necessity, like compensation, a judicial question, in respect of which there should be due process of law, notice thereof to the land owner, hearing, and opportunity to defend, as well upon the question of necessity as upon the question of compensation."

After the Legislature itself declared the necessity for the taking of Appellant's property, the mere ceremony of determining the necessity by the State Highway Commissioner meant nothing. To deny the Appellant the right to demand a Jury of twelve freeholders to determine as to whether or not it was necessary to destroy Appellant's highly desirable residential property by placing a railroad thereupon, was certainly a denial to him of a material and substantial right.

There is nothing in the "Highway Condemnation Act" to authorize the Commissioners to appraise land which is being condemned for railroad purposes. A condemnation tribunal is one of special and limited jurisdiction. "A Court of limited jurisdiction or a Court acting under special powers, has only the jurisdiction expressly delegated."

State vs. Metzger, 26 Mo. 65.

> "To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter in the suit." *Scott vs. McNeal,* 154 U. S., 34.
>
> "No judgment of the Court is due process of law if rendered without jurisdiction in the Court." (id)

Appellant has been at all times ready and willing to consider a bona fide offer by either the State or the Railway Company, for the purchase of his property. At no time has any negotiation been opened with him for such purpose. It is the contention of the Appellee, Frank F. Rogers, that under the "Highway Condemnation Act" such an effort to purchase is unnecessary before starting condemnation proceedings. He also contends that he is precluded from so doing by a provision of the contract between the State and the Railway Company, being Paragraph 8 of Sec. 10 of Act 340 of the Public Acts of 1927, which reads as follows:

> "No purchases (along the proposed new right of way) shall be made except on the joint approval in writing, of said State Highway Commissioner and Chief Engineer of the Railway Company, and should either disapprove of the price of any proposed purchase, then the same shall not be concluded, but the land therein involved shall be acquired by condemnation."

The above provision has denied to the Appellant that right which is secured to all other persons under similar circumstances. It certainly is of great importance, because without such a bona fide effort having been first duly made, the Court has no jurisdiction to continue with the condemnation proceedings to take the property. In the recent case of *Re Petition of Rogers*, 243 Mich. 517, the Court carefully considered the meaning of a "bona fide effort to purchase" and made the following comment:

> "This Court has repeatedly held that a bona fides effort to acquire the land by purchase is made mandatory by statute and, therefore, is jurisdictional, in the sense of a condition precedent to the right to invoke the power of eminent domain. * * * The statute of eminent domain is to be strictly

> construed and its jurisdictional condition must be established in fact, and may not rest upon technical waiver or estoppel. * * * The price to be offered the land owners was fixed in Lansing by the State Highway Department, and an employee of the Department was directed to make the offer. This offer of three hundred dollars per acre bore a take-it or leave-it spirit, for it was the only authority conferred upon the agent in sending him to negotiate the purchase. The Highway Department could not pay the price asked by a property owner if not reasonable, neither is the property owner required to accept an inadequate price offered by the Department, or, in case of refusal, be subjected to the expense and trouble of condemnation proceedings. The law intends a purchase based upon a fair and reasonable price reached in a good faith effort to purchase, a bona fides effort to purchase involving a willingness to pay the market value of the land wanted, and this means the amount for which the property would actually sell at the time. If the land owner is unwilling to sell, such fact does not excuse the plaintiff from making a reasonable effort to come to an agreement."

The determination for the taking of Appellant's property was filed on the 21st day of April, A. D. 1928. Ever since that date the Appellees have claimed title to Appellant's property, and have taken possession thereof in the construction of a railway right of way, and Appellant has been deprived of the title and use of his property from that date to the present time without having received any compensation. It was recently held by this Court in the case of *Liggett and Myers Tobacco Co. vs. United States*, 274 U. S. 215, that where the title to property is taken before compensation is paid, interest must be allowed to the owner thereof, from the time the property was taken,

to the time of payment of the compensation. This interest is an element of just compensation and without which the owner is deprived of his property without due process of law. All other persons in the State of Michigan whose property is taken for railway use retain title and possession until compensation is first paid. This is one of the valuable rights which has been denied to Appellant by Act 340 of the Public Acts of 1927.

Appellant Has Been Deprived of a Great Portion of His Damages

The "equal protection" clause of the Federal Constitution requires that the same elements of damages be considered and paid when private property is condemned for a public use, regardless of whether the party condemning is a governmental organization or a private corporation. It requires that all persons whose property is taken by eminent domain to be used for railway purposes, shall be compensated on an equal basis. In the case of *Beveridge vs. Lewis*, 137 California 619, a situation arose very similar to the one presented in the case at bar. A California constitutional provision provided that when property was taken by a natural person, a smaller sum of damages should be paid than when taken by eminent domain by a corporation for the same public use. Speaking from the standpoint of the property owner, the Court said:

> "Can the Legislature provide that he shall receive a smaller sum for the taking of the land when it is taken by a natural person than when it is taken by a corporation for precisely the same use, especially when the natural person may at once transfer his property to the corporation? Or, suppose two cases: land belonging to one person is being taken by a natural person and other land

> belonging to him by a corporation, the uses and burdens being in all respects similar. Can the law provide that in one case an allowance shall be made for supposed benefits and not in the other? I think it must be answered that the Legislature cannot provide for the one case a less favorable rule than the Constitution has provided for the other. They are entitled to the equal protection of the law, or, as was said in *Yick Wo vs. Hopkins,* 118 U. S., 356, 'the protection of equal laws'."

Benefits will be deducted from Appellant's award, and he will be deprived of consequential damages.

1. *Deduction of Benefits*

Under the "Railway Condemnation Act" there is no provision whereby benefits arising to the remainder of the property may be deducted. That was the common law rule of the State and has been followed from the beginning by the Courts. In the case of *Plantenga vs. Grand Rapids, etc. Ry. Co.,* 190 Mich. 661, the Plaintiff sought damages caused to his property by the construction of a railway. The Defendant atempted to show that Plaintiff would be greatly benefitted by the construction of the railway. The evidence to show benefits was excluded, and the ruling was upheld by the Supreme Court.

In the case of *Detroit, etc. Ry. Co. vs. Bank,* 196 Mich. 660, which arose under the present "Railway Condemnation Act", it was sought to deduct benefits from the Respondent's award. Construing the "Railway Condemnation Act", the Court spoke as follows:

> "The statute under which these proceedings are brought nowhere refers to benefits, and no authority is vested in the jury to estimate the benefits and reduce the award for the value by taking therefrom the amount of the estimated benefits."

"• • • In the absence of authority given by statute, benefits cannot offset the damages and should not be considered in proceedings of this kind." (To the same effect see *Highway Commissioner vs. Breisacher,* 231 Mich., 317.)

In the late case of *In Re Widening of Bagley Avenue,* 248 Mich. 1, where the City of Detroit was condemning property for street purposes, under the charter, which contained no provision for the deduction of benefits, it was sought to put in testimony to show that the property owner would be benefitted by the street project. In holding the testimony incompetent, the Court spoke as follows:

"They (the Jury) must not value the property upon any assumption of facts that do not exist; they could not consider benefits to the remaining property of the respondents in this proceeding; the testimony of any witness based on or including such benefit or advantage and charging any benefit or advantage against respondents' remaining property in order to reduce damages, was incompetent; the land or other property taken was to be valued and paid for on the basis of its best and highest use in every instance."

By the above decisions we have a firm rule established in this State that benefits cannot be considered nor deducted when property is condemned for railway purposes, and all other persons excepting Appellant have the benefit and enjoyment of this rule.

Under the "Highway Condemnation Act", however, we have a provision which allows the deduction of benefits when property is taken for *highway purposes.* Sec. 18 reads as follows:

"• • • And in like manner the benefits accruing to owners of lands by reason of laying out, alter-

> ing, widening or otherwise improving any highway or changing the line thereof, shall be taken into consideration in determining the damages to be paid to any such owner as compensation for the taking of any of his property for any such highway purpose."

The case of *Fitzsimons & Galvin vs. Rogers*, 243 Mich. 649, was one which arose to test the validity of the proceedings which are attacked in the case at bar. Some owners along the same project which affects Appellant claimed that many of their rights under the State Constitution were violated by the condemnation of their property under the "Highway Condemnation Act" in the proceedings according to Act 340 of the Public Acts of 1927, and in compliance with Act 215 of the Public Acts of 1925. One of the claims of those Respondents was that they would not receive the same amount of compensation under the "Highway Condemnation Act" as they would receive had the proceedings been brought in accordance with the "Railway Condemnation Act". The Supreme Court of Michigan went to unheard of extremes in order to uphold the constitutionality of the Acts questioned. The Court held that the proceedings were properly instituted in a Highway Condemnation Tribunal, and that it was unnecessary to afford equal access to the Railway Condemnation Tribunal when the property was being taken in the first instance by the State. The Court further laid down a rule upon the measure of damages, a question which was not then before it. It stated:

> "It is true that the highway law of this State provides that in fixing compensation the benefits accruing to the property owners are offset against the damage awarded." (Citing Section 18 of the "Highway Condemnation Act.") (p. 664)

The Court laid down the following rule which we challenge any one to find anywhere else:

> "It (just compensation) includes the value of the land, or the amount to which the value of the property from which it is taken is depreciated."

This rule within itself lays down two yardsticks for the measure of damages which are different. The first part, "value of the land", simply means the value of the land taken without allowing for consequential damages. The alternative provided is "or the amount to which the value of the property from which it is taken is depreciated" is an entirely different rule having to do only with consequential damages. To apply either of these rules would clearly deny to the Appellant the equal protection of the laws.

Showing beyond a doubt that Appellant will receive a lesser sum of damages under the "Highway Condemnation Act" than he would receive under the "Railway Condemnation Act", in the *Fitzsimons & Galvin vs. Rogers* case, *supra*, the Court spoke as follows:

> "That one legislative Act may contain a different provision than is found in another as to the measure of damages is not controlling. The test is whether the provision in the Act falls short of the constitutional requirement for just compensation" (p. 663).

In *Beveridge vs. Lewis, supra,* 137 Calif., 632, the Court spoke as follows:

> "Now, there is absolutely no natural or reasonable distinction between different persons seeking to exercise the right of condemnation, with respect to the measure of compensation for the land taken and damages for land not taken. A law might per-

> haps rightfully discriminate between the *business* of operating a railroad and some other kinds of business; but as between parties intending to engage in that business, the right of way is the same, no matter what person operates it, and there is no reason why one person should pay more for it than another person, except a desire to unjustly discriminate" (p. 632).

In the case of *Fitzsimons & Galvin vs. Rogers, supra,* the Fourteenth Amendment was never raised. Had the "equality clause" of that Amendment been raised, there is no question but what the State Supreme Court of Michigan would have been compelled to follow the decision in the case of *Beveridge vs. Lewis, supra.*

It is the contention of the Appellees, and it was so held in the Fitzsimons & Galvin case, that the "Railway Condemnation Act" provides for damages which are greater than those required by the State Constitution, and that the "Highway Condemnation Act" provides for sufficient damages to satisfy the Constitutional requirement of "just compensation". The District Court below adopted the same theory when it over-ruled Appellant's claim that he was receiving a lesser sum of damages than was required by the equality clause of the Fourteenth Amendment when it said:

> (Page 919) "I cannot agree with this argument, which, I think, is completely answered and overruled by the decision of the U. S. Supreme Court in *Brown vs. U. S.*, 263 U. S., 78."

A close examination of the Brown case, however, will show that no question as to the measure of damages was raised.

Another case which arose under the provisions of Act 340 of the Public Acts of 1927, and which involved the

same condemnation proceeding which is attacked in this case, is *Johnstone vs. Detroit, Grand Haven & Milwaukee Railway Company,* 245 Mich., 65. The question of damages was brought squarely before the Court. Upon this question the Court spoke as follows:

> "Under the Highway Act benefits are considered in determining the amount of compensation. Under the Railroad Act they are not" (p. 83).

With the above construction placed upon the two Condemnation statutes, can there be any question that there is a difference in the measure of compensation provided under each? We submit that there is a different measure of compensation, and that this difference, of which Appellant is being denied, is a controlling factor in determining as to whether or not Appellant has been denied the equal protection of the laws.

In the case of *Johnstone vs. Detroit, etc., Railway Co., supra,* the Court said:

> "In determining Plaintiff's compensation, the benefits to their property, if any, *arising from the construction and operation of the railroad, are proper to be considered.*"

Acting upon this construction, the Appellees have been producing all kinds of incompetent testimony before the Court Commissioners to show that the Railway Company in the future will operate commuter interurban service between the Cities of Detroit and Pontiac, and that there will be constructed above the right of way an elevated highway for the convenience of the persons living along the enterprise. There is no doubt but what the Commissioners will adopt the theory that they are allowed to deduct benefits and will actually deduct tremendous sums from Appellant's award because of such fanciful and

future benefits which they are called upon to assume will arise. Why should Appellant be subjected to the deduction of benefits while no other person within the State whose property is being taken for railway purposes is subjected to such a deduction?

In the case of *Beveridge vs. Lewis,* 137 Calif., 619, the Court said:

> "If he (the property owner) is compelled to contribute all that he could possibly gain by the improvement, while others in all respects similarly affected by it are not required to do so, he does not receive the equal protection of the law" (p. 625).
>
> "Can the law provide that in one case allowance shall be made for supposed benefits, and not in the other? I think it must be answered that the Legislature cannot provide for the one class a less favorable rule than the Constitution has provided for the other. They are entitled to the equal protection of the law" (p. 623).

2. *Consequential Damages to the Remainder of the Tract*

When property is condemned under the provisions of the "Railway Condemnation Act", the tribunal, which is a jury of twelve men, has jurisdiction to award all consequential and other damages which the property owner will suffer by virtue of the placing of the railway through his property. There is no provision whatever under the "Highway Condemnation Act" allowing the Commissioners to award compensation for consequential damages which the property owner will suffer to the remainder of his tract. The Highway Tribunal is one of special, and limited jurisdiction. It has no authority which is not ex-

pressly delegated to it by the statute. In view of the absence of any authority, we must conclude that the Court Commissioners will award Appellant nothing for the tremendous consequential damages which he will suffer when the railway is relocated upon his property.

The City of Detroit has a population of approximately one and three-fourths millions of people. The City of Pontiac is twelve miles north of the City of Detroit. The City of Birmingham lies between the two, and is approximately seven miles north of Detroit, and five miles south of Pontiac. Woodward Avenue connects the City of Detroit and the City of Pontiac and runs through the City of Birmingham. The Appellant's property lies a short distance from the outskirts of the City of Birmingham and it is in the center of a district which is highly restricted residential property. Appellant's property is at least three-fourths of a mile away from Woodward Avenue, which the State is seeking to widen. The tracks of the Detroit, Grand Haven & Milwaukee Railway Company lie adjacent to the East side of Woodward Avenue, and they are now approximately three-fourths of a mile from Appellant's property as stated. It is sought to relocate the aforesaid railway tracks through Appellant's highly desirable residential property, and it is for that purpose that his property is being condemned.

This Court will take judicial notice of the fact that a boulevard two hundred feet (200′) wide through residential property is often of great benefit. On the other hand, a railroad with all of the appurtenant tracks and yards through residential property damages the surrounding property to such an extent that it is practically valueless for residential purposes. Without question, Appellant's seventy-two (72) acres of subdivision acreage will be damaged in excess of One Hundred Thousand Dollars

($100,000) as a consequence of re-locating the tracks of the Detroit, Grand Haven & Milwaukee Railway Company through it.

By removing Appellant's case into a Highway Condemnation Tribunal from a Railway Condemnation Tribunal, where it belongs, the State has deprived Appellant of his absolute right to recover consequential damages to the remainder of his tract which he would unquestionably have received if the proceedings had been brought in accordance with the "Railway Condemnation Act". His right to recover this element of damages under the "Highway Condemnation Act" is speculative, and may be disregarded entirely by the Commissioners when fixing the compensation. To subject Appellant to such a hazardous procedure, while allowing the terms of the "Railway Condemnation Act" to all others, certainly denies to Appellant the equal protection of the laws guaranteed by the Fourteenth Amendment, and the District Court below was in error when it ignored this claim of Appellant.

State Highway Commissioner Given Power of Arbitrary Discrimination Against Appellant

Section 2 of Act 215 reads as follows:

> "The procedure that is, or may be, prescribed for condemnation proceedings instituted by boards of county road commissioners or the procedure that is, or may be, provided for the condemnation by state agencies and public corporations of private property for the use or benefit of the public, is hereby expressly made applicable to any proceeding brought by the State Highway Commissioner under the provisions of this Act."

Appellant contends that this Section specifically authorizes the State Highway Commissioner to proceed in any given case under either one of two separate, distinct and different condemnation acts. He is given the absolute power of arbitrary discrimination, against some individuals, and in favor of others. When any case arises he may decide in his own mind, without any judicial finding or determination, as to whether he will employ the liberal terms of the "State Agencies and Public Corporations Act" or whether he will employ the terms of the "Highway Condemnation Act" which is prescribed for condemnation proceedings instituted by Boards of County Road Commissioners. Act 340 of the Public Acts of 1927, which authorizes the condemnation of Appellant's property, provides that the State Highway Commissioner shall institute proceedings therefor "in accordance with the general laws of the State of Michigan". The State Highway Commissioner concluded that this authorized him to proceed under the provisions of Act 215 above quoted, and thereupon discriminately chose to take Appellant's property by virtue of the "Highway Condemnation Act" instead of the "Public Corporations and State Agencies Act" or the "Railway Condemnation Act".

The difference between the "Highway Condemnation Act" and the "Railway Condemnation Act" has been heretofore set out. The "Public Corporations and State Agencies Act" being C. L., 1915, Sec. 353, et seq., provides that the property owner shall have a trial by jury in a Court of record. A bona fide effort to purchase his property is required before a condemnor may start proceedings to take the property. The title to the property does not pass from the owner until just compensation is first paid. The benefits arising by virtue of the improvement cannot be considered or deducted from the award

of compensation. Consequential damages are always allowed. The jury is the one invested with the power to determine or reject the question of necessity. In case the property owner is aggrieved with the award, he has the right to appeal to the Supreme Court of the State of Michigan to review the law and the facts of the case in the same manner as provided on appeal in chancery cases.

When the State Highway Commissioner determined in his own mind to proceed under the "Highway Condemnation Act", he thereby automatically denied to the Appellant all of the privileges, immunities and safeguards which were provided in the "Public Corporations and State Agencies Act". As to other persons along the same project as Appellant, whose property might be taken for the same use as Appellant's property, the State Highway Commissioner could proceed under the "Public Corporations and State Agencies Act" and thereby allow to those owners all of the aforesaid privileges and immunities, which he has denied to Appellant.

A similar case arose in California, in which certain ordinances vested arbitrary discretion in the execution of the ordinances in an administrative officer. Condemning these ordinances in the case of *Yick Wo vs. Hopkins*, 118 U. S., 356, the Court spoke as follows:

> "They (the ordinances) seem intended to confer and actually do confer not a discretion to be exercised upon a consideration of the circumstances in each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons, so that if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition, demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for

> redress by the judicial process of mandamus to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary and acknowledges neither guidance nor restraint" (p. 366).

In a similar manner as in the case above, Sec. 2 of Act 215 prescribes no conditions for the purpose of determining which condemnation act shall be used. The State Highway Commissioner has unrestrained authority to use his own personal will, whim or caprice in the application of the Act.

In the *Yick Wo* case, the Court held, in declaring that the ordinance denied certain persons the equal protection of the laws, as follows:

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and unequal hand so as practically to make unjust and illegal discrimination between persons in similar circumstances material to their right, the denial of equal justice is still within the prohibition of the Constitution" (p. 373).

In the case of *Baltimore vs. Radecke,* 49 Md., 217, the Court, declaring the power of arbitrary discrimination vested in an administrative officer illegal, spoke as follows:

> "In fact, an ordinance which clothed a single individual with such power (of discrimination) hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void" (p. 230).

In the case of *State vs. Carter* (159 La.), 105 Southern, 247, a Louisiana statute vested arbitrary power in the State Highway Commission to grant or withhold certain privileges in regulating bus companies as it saw fit. The Court of that State, in declaring the arbitrary power of discrimination vested in the State Highway Commission by the statute denied to the Plaintiffs the equal protection of the laws, spoke as follows:

> "Our opinion is that the 11th Section of the Statute is violative of the Fourteenth Amendment. A statute or ordinance which, instead of prescribing a uniform rule of action, undertakes to vest in a public officer or commission the authority to discriminate in favor of or against persons engaged in a legitimate business or occupation or enjoying a common right, by granting or withholding a license or permit or approval, arbitrarily or according to the officer's or commission's favoritism or whim, is violative of the equal protection clause of the Fourteenth Amendment.
>
> "Insofar as the statute undertakes to give the Highway Commission arbitrary authority to favor one or discriminate against another person engaged in the business, the statute withholds the equal protection of the law."

There are many real estate operators who own property along Woodward Avenue, who desire the removal of the railway tracks from the old location, and who have favored the condemnation proceedings. The State Highway Commissioner has purchased the property from those owners on the theory that their damages could be assessed under the terms and provisions of the "Public Corporations and State Agencies Condemnation Act" and in that manner those owners have received a greater measure of damages than Appellant will be entitled to receive

under the "Highway Condemnation Act". This authority given to the State Highway Commissioner by Sec. 2 of Act 215 certainly denies Appellant the equal protection of a uniform law.

In the case of *Dickson vs. Harrington,* 108 Southern, 421 (La. 1926), an ordinance was considered which allowed the council of Shreveport to discriminately issue permits to certain filling stations, while withholding them from others. In holding that the ordinance denied to certain station operators the equal protection of the laws, the Court spoke as follows:

> "What makes the ordinance objectionable is that it prescribes no uniform rule of action, under which the council is to act in granting or withholding permits, but leaves it to the whim and fancy of the council to grant or withhold them."

In *Bizzell vs. Aldermen of Goldsboro,* 192 N. C., 348 (1926), the Court considered an ordinance which required a filling station to procure a permit from the Board of Aldermen before the location and operation of it. In condemning the ordinance, the Court spoke as follows:

> "There is no question as to the good faith of the Mayor or Board of Aldermen of Goldsboro, men of good character. The ordinances are far reaching and the law does not permit the enjoyment of one man's property to depend upon the arbitrary or despotic will of officials, however well meaning, or to restrict the individual's right of property or lawful business without a general or uniform rule applicable to all alike."

In *Gulf Refining Company vs. City of Dallas,* 10 S. W., 2d, 151, the Court considered the constitutionality of an ordinance which granted arbitrary powers to an officer

in granting or withholding a permit according to his own will. The Court spoke as follows:

> "The ordinance does not define the degree of hurt * * * but vests in the building inspector the right to exercise his own personal views in reference thereto. Therefore, as enforced against Appellant, the provisions of said ordinance are invalid as being in conflict with the Fourteenth Amendment of the Federal Constitution which provides * * * 'nor deny to any person within its jurisdiction the equal protection of the laws'."

The last expression of this Court in a case where the right of an individual to enjoy his property was dependent upon the whims of another is found in the case of *Seattle Trust Co. vs. Roberge,* 278 U. S., 116, 49 Sup. Ct. Rep., 51. In that case it was found that an ordinance prohibited the erection of a philanthropic home for children in a certain district without first having obtained the consent of two-thirds of the owners of property within four hundred feet of the proposed building. The Plaintiff in that case attacked the ordinance on the ground that it denied to him the equal protection of the laws and deprived him of his property without due process of law. The Court condemned the ordinance in the following language:

> "The Section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority — uncontrolled by any standard or rule prescribed by legislative action— to prevent the trustee from using its land for the proposed home. The Superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. *Yick Wo*

vs. Hopkins, 118 U. S., 356, 366, 368. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. (Citing cases)" (p. 122).

Likewise in the case at bar, the decision of the State Highway Commissioner in selecting a condemnation law, may be based upon his personal whim or prejudice, and still there is no review whatsoever of his decision provided for in a Court.

Appellant, therefore, submits that the District Court below was in error when it failed to find that the power of arbitrary discrimination in the enforcement of the laws, given to the State Highway Commissioner by Sec. 4 of Act 340 of the Public Acts of 1927, and Sec. 2 of Act 215 of the Public Acts of 1925, denied to Appellant the equal protection of the laws and deprived him of his property without due process of law.

The State is Taking Appellant's Property For a Use Which is Not Public

Sec. 1 of Act 215 of the Public Acts of 1925 of Michigan, authorizes the State Highway Commissioner to condemn property to be "exchanged" to a railway company whenever the Highway Commissioner has entered into a contract with the railway company for such an exchange. Sec. 4 of Act 340 of the Public Acts of 1927 authorizes the State Highway Commissioner to condemn Appellant's lands to be exchanged to the Detroit, Grand Haven & Milwaukee Railway Company. Secs. 1 and 5 of said Act 340 authorize a conveyance of Appellant's lands to the aforesaid railway company for railroad purposes. Paragraph 8 of Sec. 10 of said Act 340 provides that the State shall

be repaid all of the money expended in the condemnation of the property, by the railway company within a period of fifteen years.

It is Appellant's contention that these statutes and the contract entered into between the State of Michigan and the Detroit, Grand Haven & Milwaukee Railway Company provide for a taking of Appellant's property by the State, for a use which is not a public use, but which is a private use. The question of what constitutes a public use is always a judicial question to be decided by the Courts. The State of Michigan does not intend to operate a railway upon Appellant's land. Neither does it intend to construct and maintain a highway thereon. The State is condemning Appellant's property in the first instance for purely trading or exchanging purposes, and nothing else. The railway company is receiving the property for the purpose of operating a railway thereon in the future.

The Courts uniformly hold that property can never be condemned for trading or selling purposes merely, and that such purposes do not constitute a public use.

Beveridge vs. Lewis, 137 Calif., 618, was a case quite similar upon this point to the case at bar. In that case an individual attempted to condemn a railway right of way to be immediately conveyed to a railway company for railway purposes. The Court said in determining as to whether or not evidence was properly taken to show that the condemning person intended to convey the property:

> "The offer was in fact to show that Plaintiff was seeking to condemn the right of way solely for the purpose of transferring the same at once to the Los Angeles Pacific Railway which was engaged in building the railway, and which would own and operate it" (p. 620).

> "If the Court were convinced that the facts were as contended, the Plaintiff should not be allowed to maintain the proceeding at all. * * * One who seeks a right of way to sell merely is not in charge of a public use" (p. 621).

Trombley vs. Auditor General of Michigan, 23 Mich., 471, presents a case quite similar to the case at bar. A statute of Michigan authorized the Governor to condemn property within the State for the purpose of conveying it to the United States for the erection and maintenance of lighthouses thereon. Certain property was eased under the statute and an award for the damages was made by Commissioners. Officers of the United States Government declined to take the property and pay the award on the ground that said award was excessive, and for that reason the State refused to pay for the property. The owners brought an action of mandamus to compel the Auditor General to pay the award. Holding that the purpose for which the land was taken was not a public purpose, and therefore payment of the award could not be enforced against the State, the Court spoke as follows:

> "But when the State undertakes to do the same, not for any purposes of its own, but in order to turn the property over to the United States, the difficulties appear to us unsurmountable. In the first place, there can be no necessity for the exercise of this right by the States for this purpose, for the authority of the nation is ample for the supply of its own needs in this regard under all circumstances."

In like manner in the case at bar, the railway company has the absolute power delegated to it by the "Railway Condemnation Act" for the purpose of condemning any and all land necessary for the carrying on of its oper-

ations. There can be no underlying need or necessity for the State to step in and itself condemn the property for the railway company in this instance. The only excuse that the State has for entering into the proceeding is that it desires to widen Woodward Avenue, three-fourths of a mile away from Appellant's land.

In the case of *Salisbury Land & Improvement Co. vs. Massachusetts,* 215 Mass., 371, the Legislature established a Commission with the powers of eminent domain to procure land for public amusements and resorts. The Commission had the power to convey property after condemning to private individuals for the purpose of carrying on the work. In declaring that the taking of private property for trading purposes was unconstitutional, the Court spoke as follows:

> "The acquisition of land under the power of eminent domain to be devoted to private uses has been recently considered and discussed somewhat at length. It has been said that the exercise of the power of the State, either through taxation or eminent domain, to take land from one person with the intent of handing it over to another person, is not a public purpose, and is contrary to basic and essential principles of free government."

The very purpose for which Appellant's land is being condemned is to turn it over immediately to the railway company pursuant to the contract embodied in Sec. 10 of Act 340 of the Public Acts of 1927.

In the late case of *City of Richmond vs. Carneal,* 129 Va., 388, a statute was considered which authorized the taking of excess property for trading purposes. The Court there held that such a taking was not for a public use, and therefore deprived the owner of his property without due process of law.

City of Cincinnati vs. Vesier, 33 Fed., 2d, 242 (1929), is an instructive case upon this point. It was there held that the taking of excess property for trading purposes deprived the owner of his property without due process of law, contrary to the provisions of the Fourteenth Amendment, because such a taking was not for a public use. The Court said:

> "It is equally well settled that condemnation for a non-public use is a denial of due process of law, and that whether the use is public or private is a judicial question" (p. 244).

The primary purpose of the State of Michigan in procuring Appellant's land by eminent domain, is to trade it to the Detroit, Grand Haven & Milwaukee Railway Company for the surrender of its special charter. This charter is contained in the Laws of Michigan of 1855, No. 140 (Sec. 9). The Supreme Court of Michigan has construed this charter to be a contract between the railway company and the State of Michigan, the terms of which cannot be revoked. There is a special provision in the charter (Sec. 9 of said Act 140) which provides:

> "The said Company shall, on or before the first day of July, pay the State Treasurer an annual tax of one percent on the capital stock of said company paid in, which tax shall be in lieu of all other taxes, * * *."

The above provision has cost the State of Michigan millions of dollars in taxes, which would have otherwise been collected from the railway company. The importance of the provision will be seen in the fact that the State has attacked it in the following cases: 55 Mich., 94; 149 Mich., 122; 157 Mich., 144; 169 Mich., 72; 181 Mich., 266; and finally in the case of *People vs. Detroit, Grand Haven*

& Milwaukee Railway Company, 228 Mich., 596, where it was held by our Supreme Court that the aforesaid tax provision was a part of the contract with the State and could not be impaired by State legislation. The Court pointed out the great loss which the State was suffering by the aforesaid provision in the following language:

> "We have given due consideration to this case fully appreciating its importance. It is unfair and unjust that this Defendant should be permitted to escape from paying a tax upon its property upon the same basis as that of other railroad corporations doing business in the State. A greater burden is also thereby imposed on all other tax payers in the State, but the Courts cannot make the laws; they can but interpret them in conformity with the legislative intent. * * * The advantage gained by the Defendant and which has so greatly inured to its benefit, has been due to the holding that the contractural relation established by the Act was not subject to change, either amendment or repeal. This was settled for all time in the Joy and Powers cases."

With these facts in mind, it is not hard to see why the State made such enormous concessions to the railway company for the surrender of its special charter. The taking of Appellant's property, however, for that purpose is certainly not a taking for a public use, but is a taking for a private use. There is no contention that the people of the State will have any rights in the old charter of the railway company, which will be surrendered, to call for the exercise of the power of eminent domain. Therefore, Appellant contends that the State deprived him of his property without due process of law, and denied to him the equal protection of the laws when it contracted to condemn his property to be conveyed to the railway company for the surrender of its special charter. A close

examination of Act 340 of the Public Acts of 1927 and the contract embodied in Sec. 10 thereof will show that the impelling motive which prompted the State to pass Act 340, and enter into the contract embodied therein, was for the purpose of procuring the surrender of the railway company's charter.

The widening of Woodward Avenue, three-fourths of a mile away from Appellant's property, was simply a cloak thrown around the scheme in order to allow the condemnation of Appellant's property as a "highway project". Property cannot be condemned for partly a private and partly a public use. *Berrien Springs Water Power Co. vs. Circuit Judge,* 133 Mich., 48.

Brown vs. United States Distinguished from the Case at Bar

The Court below over-ruled all of Appellant's claims on the ground that the case at bar was governed by the principles of law laid down in the case of *Brown vs. United States,* 263 U. S., 78. The Court stated:

> "I cannot agree with this argument (of Appellant) which, I think, is completely answered and over-ruled by the decision of the United tSates Supreme Court in *Brown vs. United States,* 263 U. S., 78."

The court was certainly in error when it made this statement, because none of the contentions raised by Appellant in this case were raised in the Brown case. In the first place, the provisions of the Fourteenth Amendment apply only to state action. In no way do they apply to or limit the powers of the Federal Government. Consequently, of course, the equal protection clause and the

due process clause of that amendment were neither raised nor considered in that case. There is no reason why the Federal Government cannot make special laws applying to any situation which might arise. In the Brown case the United States Department of the Interior desired to construct an irrigation dam at American Falls, Idaho. It so happened that the town site was upon low land which it was desired to inundate by water confined in the dam.

The facts in the Brown case are set out in detail in the opinion of the District Court in *U. S. vs. Brown*, 279 Fed. 168. American Falls, Idaho, was a small town located along Snake River, in the midst of an arid territory. The Federal Government desired to construct a dam across Snake River to impound the flood waters for use in irrigating arid lands embraced in the Minidoka project, a short distance down the river. The water thus enclosed would submerge three-fourths of the town site, including the up-river portion. In order to keep the town site intact, for the accommodation of the people in the surrounding territory included in the project, the Government determined to condemn land on the Easterly side of the one-fourth of the city that remained unflooded, and to re-locate thereon the buildings and governmental enterprises which had formerly been upon three-fourths of the area of the town site desired to be flooded. By the laws of Idaho irrigation is recognized as a public use. "Hence the power of the Government to construct the proposed reservoir, and its rights to do all things incidentally necessary to that end, the Defendant does not question."

The Court remarked on p. 169:

> "Upon the other hand it must be conceded that generally the Government is without the power to

engage in the promotion of town sites, and unless the enterprise here bears a substantial relation to the irrigation project, it cannot be held to be of such a public character as to warrant the exappropriation of private property. Such relation does not necessarily arise from the mere fact that the town site may turn out to be profitable, and that the irrigation project being the beneficiary may be constructed at a smaller net cost than would otherwise be possible."

The above language shows without a doubt that the simple fact that the State will be greatly benefitted financially by the condemnation of Appellant's property under the Highway Act, for the purpose of trading it to the railway company for its special charter, and a portion of its right of way does not justify the taking of Appellant's property.

The important reason for the relocation of the town site in the Brown case was the fact that the Federal Government's authority to condemn property used by the City, an agent of the State, in connection with its governmental functions, is doubtful. The Court in *U. S. vs. Brown, supra,* p. 170, spoke as follows:

"However, the case here presents other considerations. The conditions are exceptional. The major part of the improved and occupied town site is essential to the execution of the great public work. Vested rights there are, in great variety and complexity, public as well as private. It is fair to assume that on the town site are streets and avenues, sidewalks, water pipes, sewers, schoolhouses, and possibly other structures. *The right to condemn may be doubtful, and even if the right be assumed,* the process of procuring title necessarily intricate and difficult."

> "By providing and improving an equivalent site in close proximity the Government may, by voluntary action on the part of private owners and the public, be able to acquire rights which otherwise it would be impossible or at least extremely difficult to extinguish" (id).

It will be noted from the above language that the right of the Federal Government would clash with that of the sovereign State when it attempted to destroy the State's governmental enterprises in connection with the City, and hence the right to codemn is doubtful. No such condition exists in the case at bar. The State has the absolute power to condemn any and all property, including the railway right of way lying adjacent to Woodward Avenue, needed for the purpose of widening or improving that highway. Compensation by substitution is entirely unnecessary as far as the State's right to condemn is concerned. Furthermore, if the State had condemned a part of the right of way of the Detroit, Grand Haven & Milwaukee Railway Company, then that railway company had the absolute power to condemn property for its own use, without the aid of the State or anyone else in connection therewith, by virtue of the provisions of the "Railway Condemnation Act."

It was due to the exceptionally peculiar conditions in the Brown case that the Court upheld the proceedings to condemn the property. The District Court in that case said:

> "In view of the unusual conditions here confronting Congress, I do not think it can be said that its judgment, in the language quoted is 'palpably without reasonable foundation.' Upon investigation it may have been fairly concluded that, without such authority, it would be impracticable for the Reclamation Service to execute the reservoir project" (279 Fed., 171).

The Brown case was brought to this Court on appeal, and the decision therein is reported in *Brown vs. U. S.* 263 U. S. 79.

It will be noted that this Court laid down no general principles of law, which would justify the taking of one man's land by the State for the purpose of turning it over to another, like the State is attempting to do with Appellant's property. This Court merely affirmed the decision of the Court below, that the means employed was the only practical one which could be used in view of the peculiar circumstances of the case, and without which the irrigation project would fail. The Court said:

> "The Plaintiffs contend that the power of eminent domain does not extend to the taking of one man's property to sell it to another, that such an object cannot be regarded as for a public use of the property, and, without this, appropriation can have no constitutional validity. The District Court held that the acquisition of a town site was *so closely connected with the acquisition of the district to be flooded and so necessary to the carrying out of the project* that the public use of the reservoir governed the taking of the town site. We concurr in this view."

Further commenting upon the peculiar topography of the territory surrounding the town, which required that a part of it be moved to one side in order to allow the flooding of the land, the Court spoke as follows:

> "The circumstances in this case are peculiar. An important town stood in the way of a necessary improvement by the United States. Three-fourths of its streets, alleys and parks, and of its buildings, public and private, would have to be abandoned. The buildings could not be moved except to the gradually rising ground East of the Snake River.

> There was a bluff 100 feet high on the other side of the river. The tract of 475 acres selected for the new town site *was the only practical and available place to which the part of the town to be flooded could be moved so as to be united with the one-fourth of the old town which would be left*" (p. 81).

The above language shows a marked distinction between the Brown case and the case at bar.

The Brown case, moreover, was one which arose in connection with a project for the reclammation of arid lands. The owner of property in the arid Western States holds it subject in every way to the right of the State or Federal Government in promoting irrigation projects. The taking of property for such purposes has been upheld by the Courts in cases where such a taking would never have been upheld if the property had been taken for a purpose other than irrigation. The constitutional provisions do not operate to check the power of the Government in arid areas as they do in other districts of the country, where irrigation is unnecessary. This Court has recognized that fact more than once. In the case of *Clark vs. Nash*, 198 U. S. 361, this Court said:

> "Whether the statute of a State permitting condemnation by an individual for the purpose of obtaining water for his land or for mining, is or is not a condemnation for public use and, therefore, a valid enactment under the Constitution, depends upon considerations relating to the situation of the State and its possibilities for agricultural and mining industries.
>
> The rights of a riparian owner in and to the use of water flowing by his land, are not the same in the arid and mountainous western States as they are in the eastern States.

This court recognizes the difference of climate and soil, which render necessary different laws in different sections of the country, and what is a public use largely depends upon the facts surrounding the subject, and with which the people and the courts of the State must be more familiar than a stranger to the soil.

While private property may not in all cases be taken to promote public interest and tend to develop the natural resources of the State, in view of the peculiar conditions existing in the State of Utah, and as the facts appears in this record, the statute of that State permitting individuals to enlarge the ditch of another and thereby obtain water for his own land, is within the legislative power of the State, and does not in any way violate the Federal Constitution."

In the Brown case there was no other available place where the town could be moved because of the peculiar topography of the property. It was impossible for the United States to condemn a part of the municipal organization which was an agency of the State. Therefore, the United States Government simply moved the town out of its way because that was the only available way out of the dilemma.

In the case at bar, however, there is ample room for moving the railway tracks to a new location, 100 ft. wide on either side and still adjacent to the highway. The new portion could still be connected up to the remainder of the line of tracks and the operation of the railway company would in no way be impaired. There is no peculiar topographical condition along either the highway or the railway which would prevent the removal of the railway to a new location 100 ft. away and thereby allow ample space for the widening of the highway known as "Woodward Avenue."

To say that the reasoning in the Brown case permits the State to remove the railway tracks three-fourths of a mile away to an entirely new location, comprising a distance of 9.1 miles is ridiculous. The State desires only 5¼ miles of the railway's present right of way for the widening of Woodward Avenue. How can it be said that this fact justifies the taking of property for a new right of way 9.1 miles in length as a "highway project"? If the State needs only 5¼ miles of the old right of way for highway purposes, why is it necessary for it to condemn the new right of way 9.1 miles in length, which is approximately four miles longer than the portion which the State desires for highway purposes? The only answer that can reasonably be given is that the State is seeking to enrich the railway company by handing over to it the new right of way which the State is now procuring. We think that the Brown case has no application to the facts presented in the case at bar, and therefore not controlling upon any of the issues herein raised.

In the Brown case, supra, the Court further pointed out reasons why compensation by substitution was the only method by which payment could be made for the land flooded, in the following language:

> "It would be hard to fix a proper value of homes in a town thus to be destroyed without prospect of their owners finding homes similarly situated on streets in another part of the same town or in another town near at hand. It would be difficult to place a proper estimate on the value of the streets and alleys to be destroyed and not to be restored in kind. A town is a business center. It is a unit. If three-fourths of it is to be destroyed, by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the State, whose

subordinate agent of government is the municipality, are injured. A method of compensation by substitution would seem to be the best means of making the parties whole. The power of condemnation is necessary to such a substitution" (p. 82).

In the case at bar, the State could condemn the 5¼ miles of the railway company's right of way adjacent to Woodward Avenue and desired for the widening thereof, without question. There is no doubt but what every element of damages could be precisely ascertained, and paid to the railway company. A railway company always holds its property, subject to the power of eminent domain in the State. There is certainly no reason to think that the railway company would find any more difficulty in procuring a new site, and locating thereon its line of tracks, than the State will be subjected to, in so doing. The inconvenience to the railway company in the operation of its trains will be the same, regardless of who the person is who re-locates the tracks.

It must be kept in mind that the proposed new right of way 9.1 miles in length will be of tremendous benefit and gain to the railway company. The State had to necessarily make the proposition attractive in order to induce the railway company to surrender its special tax-free charter. The new right of way which the railway company is receiving, will eliminate many of the inclines, declines and curves from its line of tracks, which hinder it in the operation of its trains along the old right of way adjacent to Woodward Avenue. Furthermore, the railway company desired to straigthen its right of way in order to make practical the construction of an elevated motor vehicle highway, for toll and reward, between the cities of Detroit and Pontiac, above its line of tracks. Since the State

has turned over the new right of way which runs across Appellant's property to the railway company it has sold or leased the aerial rights above the right of way, and there will be constructed within the immediate future an elevated motor vehicle highway across Appellant's lands, above the tracks of the Detroit, Grand Haven & Milwaukee Railway Company. It is admitted that the old right of way of the railway company along Woodward Avenue contained too many curvatures to make profitable the operation of an elevated motor vehicle highway above the tracks. It must be further remembered that the railway company will receive the 9.1 miles of railway right of way, for which it will pay only "highway prices," instead of the measure of damages which it would be required to pay if it procured the land by condemnation for itself under the "Railway Condemnation Act." The burden of bearing the loss which will necessarily result from this transaction, will not fall upon the State, but will fall directly upon the property owner, who in this case, is Appellant. These are conditions which did not confront the Court in the Brown case, because there was no contention there that the Government was enriching a third party at the expense of the property owner, as Appellant claims here.

Furthermore, the tax payers of the State of Michigan generally will be benefitted by the surrender to the State of the tax-free charter of the railway company. In order to reap this benefit for the tax payers, the State is using Appellant's property as the means of procuring the surrender of the aforesaid charter. Why should Appellant be called upon to give up his property for this purpose instead of having the burden distributed equally upon all tax payers in the State?

In the Brown case there was no contention that the Government was reaping a great benefit from a source

entirely outside of the improvement project, by reason of the terms of a private contract, as Appellant contends the State is doing in this case, by reason of the contract entered into between itself and the Detroit, Grand Haven & Milwaukee Railway Company, embodied in Sec. 10 of Act 340 of the Public Acts of 1927.

One of the most important distinctions between the Brown case and the case at bar, lies in the fact that the State is not using the regular methods of condemning property for railway purposes. In the Brown case, supra, the Federal Government employed the identical statute of the State of Idaho which would have been employed if any other party had condemned the property. In that way there could be no question but what the Government was employing the proper procedure. It was admitted that the same measure of damages would be paid to the Plaintiff in that case, as would have been paid by any other person, condemning the property for the same purposes. The property owner enjoyed procedural rights available to all other persons within the State under similar circumstances.

In the case at bar, however, the State is discriminating against Appellant by using statutes which deny to him procedural rights enjoyed by all other persons whose property is being taken for railway purposes, and which deprive him of a great portion of the damages which he is entitled to receive and which all other persons in similar circumstances do receive. These are questions which involve the equal protection clause and the due process clause of the Fourteenth Amendment to the Federal Constitution, and which were, of course, not before the Court when it decided the case of *Brown vs. U. S., supra.*

We have pointed out the many distinctions between the facts presented in the Brown case and the case at bar.

It will be seen that there is very little similarity between the facts in each case. Therefore, it cannot be said that the Brown case is governing upon the question of necessity, or the question of whether or not Appellant's property is being condemned for a public use, and we submit that the District Court was, therefore, in error when it decided that this case was governed by the principles laid down in the case of *Brown vs. U. S., supra.*

There Is No Necessity For the Taking of Appellant's Property By the State For Trading Purposes.

The Legislature specifically authorized the State Highway Commissioner to condemn any and all property necessary for the actual widening and improving of Woodward Avenue between the Cities of Detroit and Pontiac in Act 259 of the Public Acts of 1923. The power was all inclusive and did not except railroad property from the operation of the Act. In fact, the intention of the Legislature was to authorize the Highway Commissioner to condemn the 5¼ miles of the right of way of the Detroit, Grand Haven & Milwaukee Railway Company lying adjacent to the Easterly side of Woodward Avenue for highway purposes. This Act, of course, was passed several years before Act 340 of the Public Acts of 1927 which authorized the condemnation of Appellant's property three-fourths of a mile away from the highway for trading purposes. The State Highway Commissioner began proceedings and condemned all other property along Woodward Avenue necessary for the widening thereof in conformity with Act 259 of the Public Acts of 1923 as aforesaid. The Court had occasion to construe the terms of this statute in the case of *Highway Commissioner vs. Breisacher,* 231 Mich. 317, and the Court there held

that in the proceedings thereunder, the benefits arising by reason of the improvement, could not be considered nor deducted, and the owners of property involved by the proceedings therein, received damages accordingly. Act 259 of the Public Acts of 1923 remains in full force and effect at the present time, and may be utilized by the Highway Commissioner to condemn any land, including railway rights of way, necessary for the widening of Woodward Avenue.

Appellant contends that there can be no necessity for the condemnation of his property to be used as compensation, in substitution for the present right of way of the railway company, as long as there is any other means through which the State can procure the railway property which is desired to be actually used in the widening of Woodward Avenue. As long as the State Highway Commissioner is expressly authorized to condemn any property along Woodward Avenue for highway purposes, there can be no necessity of taking the property belonging to Appellant three-fourths of a mile away from that highway, under the guise of a "highway project." Furthermore, there is ample land along the Westerly side of Woodward Avenue which is now vacant, and which could be properly and conveniently utilized for the widening of that highway. With this fact in mind, can it be said that compensation by substitution is a public necessity? We think that it cannot. The fact that there is other property conveniently available to be actually used for highway purposes, and which is now vacant, negatives any presumption that the taking of other property three-fourths of a mile away is necessary. Compensation by substitution seems to be allowed only in case there is no other property available, and only in case the project would fail unless the compensation was made by substitution. As long as there is other property available there

can be no necessity for the State Highway Commissioner to reach out three-fourths of a mile from the highway and condemn property in order to compensate the railway company for that portion of its right of way which is desired to be surrendered for highway purposes.

Validity of State Statute Authorizing the State To Condemn Land to Trade to the Railway Company When the Railway Company Already Has the Right to Condemn That Land Itself.

It can never be necessary for the State to condemn property to be traded or turned over to a railway company for railway purposes when the railway company itself already has the right to exercise the power of eminent domain delegated to it.

Suppose the State actually took and used the 5¼ miles of the railway company's right of way lying adjacent to the Easterly side of Woodward Avenue for the purpose of widening that highway, there is still no necessity for the State to procure another right of way for the railway company, because the railway company itself has that power delegated to it by the State, and may exercise it at any time. There certainly can be no necessity under these circumstances for the State to go out and procure a new right of way for the railway company. It was to cover a situation just exactly like the one here arising that the Legislature passed the "Railway Condemnation Act," thereby delegating the power of eminent domain to the railway company and authorizing it to procure land necessary for its operations.

It has been held many times by this Court that the question of necessity for taking property by eminent

domain for a purpose, which is generally recognized to be a public one, is a legislative question, which may be determined by the Legislature. When the Legislature, however, attempts to declare the necessity for taking property, by eminent domain, for a purpose which is not generally recognized to be a public one, the Courts will step in and determine as to whether or not there is actually a necessity for the taking of the property for the designated purpose and whether or not the purpose is a public one. The taking of private property for trading purposes has never before been held to be a public necessity in the State of Michigan. It has never been considered necessary for the State or anyone else to procure land by condemnation for the purpose of turning it over to another person or institution who already has the right to exercise that power. On the contrary it has universally been held by the Courts that a statute which declares the necessity of taking property for such purposes deprives the owner of such property without due process of law. The rule is well stated in *Nichols on Eminent Domain, 2d E. Vol. 1, p. 126,* as follows:

> "Whatever may be the precise meaning of due process of law, there can be no question that it does not include such a gross violation of the rights of property and of the principles of constitutional government as the taking of one man's land by the State and giving it to another for his private use and benefit. * * * Such a taking when authorized by a State is in violation of the Fourteenth Amendment."

The above rule was applied in *Missouri Pacific Railway Co. vs. Nebraska,* 164 U. S. 403; *Fallbrook Irrigation District vs. Bradley,* 164 U. S. 112.

In the case of *Trombley vs. Humphrey,* 23 Mich. 471, the Legislature authorized the Governor to condemn land

to be turned over immediately to the Government of the United States for the purpose of erecting a lighthouse thereon. The Legislature declared the taking for that purpose to be a public necessity, just as the Legislature has done in procuring Appellant's land for the railway company. The Federal Government in that case had the right to exercise the power of eminent domain for lighthouse purposes, just as the railway company has the right to exercise the power of eminent domain in procuring a right of way for railway purposes in the case at bar. The question arose as to whether or not there was actually a necessity for the State to procure property to turn over to the Federal Government when that Government could procure the same land on its own behalf. It was contended that the purpose of erecting a lighthouse was a public purpose, analogous to the Apellees' claim in this case that taking property for a railway right of way is a taking for a public purpose. The Court held that although the erection of a lighthouse was in fact a public purpose, the taking of the property by the State, to be traded to the Federal Government for that purpose, was not a taking for a public purpose, and the Court judicially determined that there was no necessity for such a taking in the following language:

> "In the first place there can be no necessity for the exercise of this right by the States for this purpose, for the authority of the nation is ample for the supply of its own needs in this regard under all circumstances" (p. 476).

In the case at bar the railway has the right to condemn land under all circumstances, for its own use, just as the Federal Government did in that case. By the same analogy there cannot be a necessity for the State to condemn land to turn over to the railway company, even

though the operation of a railroad is a public purpose, and this Court will judicially determine as to whether or not there is in fact any necessity for the condemnation of Appellant's property for that purpose.

Suppose the Detroit, Grand Haven & Milwaukee Railway Company should decline to accept the new right of way from the State in accordance with the terms of the private contract. In such a case the State would have the property upon its hands, and would be obliged to sell it out for private purposes whenever it found it advantageous to do so. There is no means by which the Appellant could force the railway company to accept the property from the State, and operate its trains thereupon. If the railway company should reject the property, the only remedy which the State would have would be an action for breach of the private contract. Appellant's property nevertheless would be dissipated among private interests, over which the public would have no control. Upon this point the Court in the Trombley case, supra, spoke as follows:

> "We reach the extraordinary result that the State may seize and appropriate the lands of an individual for the sole purpose of turning it over to the Union for its needs; while on the other hand the Union is at liberty to accept it or not at its option, and if it shall refuse, the State, whose position in the taking was that of an agent merely, without any interest whatever of its own, must, nevertheless, retain and pay for the land, while the owner who was subject to this obligation only, that he should surrender his property to the public needs is found to have been deprived of it on a claim of necessity, which the Government repels, and has no security against its being appropriated to any private purpose for which the State authorities may find it advantageous to sell it. This simple state-

> ment appears to us to demonstrate that the State can have no such power as has been attempted to be exercised in the case before us. It is of no importance in this proceeding that the Federal authorities, at first, expressed a desire for the appropriation of the land" (p. 477).

In like manner in the case at bar, it is immaterial that the railway company has expressed a desire for the appropriation of the land, as that expression is not binding.

Continuing the opinion in the Trombley case, supra, the Court said:

> "The parties to it are the nation on the one side and the property owner on the other; and any interference of a third party except as he may be called in to judge between them, is mere impertinence. It would be absurd to hold that an individual might intervene, and of his own motion seize and hold the property of his neighbor, in order to turn it over to the nation if the nation should see fit to take and use it, but until we are prepared to hold this, we shall be compelled to deny to the State the like power, and upon the like reasons" (p. 478).
>
> "When Congress discovers a necessity for such legislation there can be little doubt of its adoption. * * * The power of the general Government is ample, and the only question we are to discuss is the authority of the State in cases in which the right of Federal action is unquestionable to step in and act for it" (p. 479).

In like manner when the railway company discovers it is necessary to procure land for right of way purposes, it also has all of the power and authority necessary to condemn the land needed, and the procedure is outlined

therefor. Its right to condemn is unquestionable.

In the Trombley case, supra, the Court said:

> "That cannot be due process of law in any case which rests upon legislative enactments either *not properly legislative in their nature,* or relating to subjects not within the sphere of the sovereignty enacting them. * * * The authority exercised, which assumes to be legislative, must be legislative in fact" (p. 483).

> "They (the enactments), therefore, constitute an attempt to appropriate the property of individuals without due process of law" (p. 483).

In the case at bar, as in the Trombley case, the Legislature attempted to legislatively declare the necessity for the State to take private property for the use of another. In Sec. 4 of Act 340 of the Public Acts of 1927, the Legislature declared the "lands necessary or required to carry out this Act and said proposed contract, are hereby declared to be a public necessity. * * *"

When the Legislature declared the necessity of the taking of Appellant's property for trading or exchanging purposes as aforesaid, it departed from the realm of things legislative, and attempted to acquire jurisdiction over things judicial. It declared the necessity for the taking of Appellant's property for a purpose which is not public, and thereby deprived Appellant of his property without due process of law, and denied to him the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution, and the District Court below was in error when it failed to so find.

The State of Michigan Cast Away Its Mantle of Sovereignty and Became Bound by the Same Rules of Law as an Individual Would Be, When It Entered Into the Contract with the Railway Company Prescribed in Act 340 of the Public Acts of 1927.

If the present procedure of the Appellee Rogers is lawful, then the only place in the whole State of Michigan where a steam railway and yards can be built through a land owner's property without just compensation being first made or secured, and with deduction of benefits, and under a highway tribunal, is a strip 9.1 miles in length between the Cities of Royal Oak and Pontiac.

Likewise, the only place in the whole State of Michigan where a steam railway and yards can be built through a land owner's property without his being given an option of a trial by jury as to the questions of necessity and damages, is the same strip of 9.1 miles between the Cities of Royal Oak and Pontiac.

The Appellees, while conceding that the State could not legally confer the power upon a private person or a private corporation which it has conferred upon itself to do and what it is doing for the railway company in this case, nevertheless contend that the Appellant cannot complain because the State of Michigan is a sovereign State, and is in the performance of a governmental function.

It is urged by Appellees that the contract between the State and the Railway Company is one which makes the State a principal and the Appellees Railway Company and Nelson Company, its agents. We contend that a careful reading of the contract discloses just the opposite;

that it makes the Railway Company the principal and the State Highway Commissioner the agent in some respects, and in other respects they are apparently partners.

We insist that when the State of Michigan entered into the agreement embodied in Act 340, Public Acts of 1927, by the terms of which it agreed to acquire a right of way for Appellee Railway Company, as to the manner of and the sums of money to be paid in acquiring the same, it deliberately chose to cast aside and throw off its mantle of sovereignty and thereby became a servant and agent of its principal, the Railway Company, and it should not be allowed in this proceeding any greater or special immunities than its principal, the Railway Company, would be allowed, insofar as the rights of innocent third parties, whose property is being taken, are involved.

In other words, we insist that in the carrying out of this principal and agent agreement which the State and the Railway Company deliberately chose to enter into and under which the State ceases to function governmentally, it should be held, in order to protect the rights of innocent third parties whose property is being taken, that the rights accorded to the State as a sovereignty are lost and that the State becomes bound precisely as its principal, the Railway Company, would be bound, or any private individual or private corporation would be bound, to proceed under the Railway Condemnation Law, and to pay consequential damages, and to refrain from deducting benefits, and this without regard to the motive which prompted the execution of the agreement or the consideration which passed between them for its execution.

We concede that in the building of a highway the sovereign state functions governmentally and as such enjoys many privileges and immunities which are not

accorded to an individual or private corporation. On the other hand, we contend that when the State enters into the business of acquiring a private right of way for a private corporation, it is not performing a governmental function and is not entitled to these privileges and immunities which it would be entitled to as a sovereign State if functioning governmentally. It is the character of the act being performed and the use to which the property is to be put, which is the determining factor on this question.

What if a private corporation instead of the State of Michigan had entered into this contract with the Railway Company, for the acquisition of its right of way and had passed a resolution by its board of directors that it would offer and pay to the property owners whose land it sought to take only such sum as the Railway Company dictated, that it would deduct benefits and would pay no consequential damages? Would anyone be foolish enough to say that this resolution would be of any legal force or binding effect upon the property owner whose land was sought? Certainly, not. Here we find the State doing practically the same thing. It passes a statute authorizing and under which it enters into an agreement whereby the Railway Company becomes the final arbiter as to the character and amount of damages which will be offered and deposited, and after which Appellant's property is taken, and now seeks to sustain the constitutionality of such Act by claiming that it is functioning governmentally in so doing.

By analogy it follows that when the State of Michigan passed Act No. 340, Public Acts of 1927, and provided that the State should enter into this agreement whereby it became the agent of the Railway Company in acquiring the right of way for the Railway under the Highway

Condemnation Law, which permits the Railway Company to have the last say as to the character and amount of damages offered and deposited before Appellant's land is taken, either the State lost all of its sovereign rights and immunities as such or the Act is unconstitutional in granting special immunities and denying equal protection.

Likewise, suppose a private corporation which enters into a contract with the Railway Company to procure a right of way for it, passes a resolution of its board of directors that it would proceed under the "Highway Condemnation Act" instead of under the "Railway Condemnation Act," thereby depriving the person whose land it was sought to take of the right to trial by jury, attorney's fees and other rights which the land owner is entitled to under the "Railway Condemnation Act." No Court would hold the resolution valid and binding on the land owner. This is just what the State, through its Highway Commissioner, is doing in this case, and all while it is acting not governmentally but privately.

In *Borski vs. City of Wakefield,* 239 Mich. 656, the City was engaged in the business of carrying passengers for hire, and in holding that in so doing it ceased to function governmentally and that the statute requiring the filing of a claim as a prerequisite to the beginning of suit would be unconstitutional if the Legislature so intended, our Supreme Court spoke as follows:

> "Our Court has said that when so engaged, it (the City) is governed by the same rules which control a private individual or business corporation under like circumstances * * * otherwise it would be granting to one class engaged in private business privileges or immunities not possessed by others under like circumstances. * * * When a city voluntarily enters into the same commercial business as private citizens, there is no good reason

> why it should be given special privileges not enjoyed by others who are compelled to meet its competition. * * *"
>
> "It would be giving the city a defense not available to private persons or public corporations while engaged in the same line of business."

Likewise, in the case at bar, if the State Constitution allowed the State to enjoy immunities not enjoyed by its citizens, in the condemnation of property, pursuant to a private contract, such provisions would deny to persons affected thereby, the equal protection of the laws.

In the case of *Carr vs. State,* 26 N. W., 778, the State issued bonds in order to raise money, under valid legislative authority. Later the State attempted to defeat its liability thereon by reason of its sovereignty. Holding that the State was bound the same as any other person would be in similar circumstances, the Court spoke as follows:

> "In entering into the contract it laid aside its attributes as a sovereignty, and bound itself substantially as one of its citizens when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual's rights and responsibility, measures, with few exceptions, those of a State whenever it enters into an ordinary business contract."

In the case of *Davis vs. Gray,* 16 Wall. (U. S.), 203, the State made certain land grants which it later desired to revoke. These grants were in the nature of a contract. Holding that the State was bound thereon, the Court spoke as follows:

> "When a State becomes a party to a contract, as in the case before us, the same rules of law are

> applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty."

The following note is found in 13 L. R. A., 170:

> "In entering into a contract, a State lays aside its attributes of sovereignty and binds itself substantially as one of its citizens under his contract and the law which measures individual rights and responsibilities measures, with few exceptions, those of the States."

In the recent case of *Johnstone vs. D. G. H. & M. Railway Company,* 245 Mich., 65, in which the Court construed Act 340 in connection with the taking of property along the same project which affects Appellant here, the Court spoke as follows:

> "The contention, that there is a difference in the character and effect of the power of eminent domain when exercised by the State than when used by a municipality, is not tenable. It is the same attribute of sovereignty whatever the agency through which it is exercised" (p. 84).

It has been the contention of the Appellees all the way through this case, that the State is functioning governmentally in acquiring Appellant's property by condemnation for trading purposes, and that, therefore, the State is exempt from all of the restrictions and conditions which are placed upon other persons when condemning property for like purposes. We think, however, that the above cases bring out clearly the fact that the State is bound to exactly the same rules as the railway company would be if it were condemning the property for itself.

When the State of Michigan entered into the contract as prescribed in Sec. 10 of Act 340 of the Public Acts of 1927, it thereby cast aside its sovereign immunities and became the agent of the railway company. And, for that reason, it has no greater powers or privileges than its principal, the railway company, would have if it were actually condemning the land.

The only excuse which the District Court below gave for allowing the State to proceed under special statutes to condemn Appellant's property, lies in the fact that the State is widening a highway known as Woodward Avenue. The widening of this highway the Court contends is an exercise of the sovereign powers of the State, and for that reason the State is acting governmentally, in condemning Appellant's property, none of which is less than three-fourths of a mile distant from said highway. The Court failed to take into consideration that the condemnation proceeding was only necessary to carry out the terms of the private contract entered into between the State of Michigan and the Detroit, Grand Haven & Milwaukee Railway Company. We think that Judge Hickenlooper, who wrote the minority opinion in the case, was correct when he said:

> "Under the circumstances in this case, I feel that it must be conceded that the plaintiff's property is being appropriated for railway purposes and not for a highway. It is being taken under the provisions of Act 340 of 1927, and this Act expressly provides for an appropriation for railway right of way. This is recognized by the Supreme Court of Michigan in the case of *Johnstone vs. D. G. H. & M. Railway Company, et al.*, 245 Mich., 65, wh[illegible] the Court says: 'In determining plaintiff's c[illegible] pensation the benefits to their property, if any, arising from the construction and operation of the railroad are proper to be considered.' * * * All

parties concede that it is to railway uses to which the land is to be put."

"To say that because a general highway improvement gives rise to the desirability or even necessity of so relocating the railway, the property needed is being taken for highway purposes, is to fail to distinguish between the impelling reason for condemnation and the use and purpose for which the lands are in fact taken, and to which they will in fact be put." 33 Fed. 2d, 920.

If Appellant's property is being taken for railway purposes, as we here contend, instead of for highway purposes, the State is not acting in a governmental capacity, and, therefore, its sovereign rights are not involved. That being the case, the State has no right to condemn Appellant's property, but if it does attempt to do so, it must proceed in the same manner and under the same statutes as the railway company would proceed if it were condemning the property on its own behalf.

In the two cases which have gone to the Supreme Court of Michigan in connection with the condemnation by the State of the new right of way to be traded to the railway company pursuant to Act 340 of the Public Acts of 1927, that Court has held that the enterprise for which the property was being condemned was a State project, and for that reason the State could exercise its sovereign power of eminent domain in any manner which it saw fit, so long as "just compensation" was provided in accordance with the Constitution of the State of Michigan. In the first case, *Fitzsimons & Galvin, Inc. vs. Rogers,* 243 Mich., 649, the Court pointed out that under the "Highway Condemnation Act" the damages would be less than they would have been if the property had been condemned in accordance with the "Railway Condemnation Act." The Court said:

> "There is no provision in our statutes for offsetting benefits against damages incident to taking land for a railway right of way, and in the absence of an express statutory provision such a deduction cannot be made."

The Court also said:

> "It is true that the Highway Law provides that in fixing compensation the benefits accruing to the property owner are offset against the damages awarded." id. (p. 664).

The Court further said:

> "That one legislative act may contain a different provision than is found in another as to the measure of damages is not controlling. The test is whether the provision in the Act falls short of the constitutional requirement for just compensation." id. (p. 663).

In spite of the clear cut discrimination pointed out by the above language, the Court went ahead and justified the procedure under Act 340 in accordance with the "Highway Condemnation Act" by saying:

> "The present proceeding instituted by him is 'in accordance with the general laws of the State,' and if those laws are properly administered plaintiff's rights as to just compensation will be fully respected." id. (p. 665).

It is clear by the above language that the Court in one breath said that the owners will receive a lesser sum of damages under the "Highway Condemnation Act" than they would receive under the "Railway Condemnation Act," and in the next breath it said that although this be true they will still receive all the compensation which is required by the State Constitution to afford "just compensation."

The Court in the *Fitzsimons & Galvin case, supra,* based its decision allowing the condemnation of the aforesaid property for railway purposes upon the fact that the State was functioning governmentally (p. 663), and also upon the case of *Brown vs. U. S.* (p. 659).

In the second case which arose in connection with the carrying out of the project embodied in Act 340 of the Public Acts of 1927, which is *Johnstone vs. D. G. H. & M. Railway Co.,* 245 Mich., 65, the Court said in regard to the measure of damages which the owners along the railway right of way will receive:

> "Under the Highway Act, benefits are considered in determining the amount of compensation. Under the Railway Act, they are not. * * * In determining plaintiffs' compensation, the benefits to their property, if any, *arising from the construction and operation of the railroad* are proper to be considered" (p. 83).

There is no question but what benefits will be deducted from Appellant's award, because of the above construction placed upon the "Highway Condemnation Act." These benefits will include both general and special benefits as well as those which are speculative and indeterminate. The Supreme Court of Michigan has allowed these deductions to be made. It has said that the procedure is proper and that the deductions can be made, because the State is a sovereign, and is exercising powers in connection therewith. It is not contended that such a deduction could be made if any other person, or the railway company itself, were taking the property.

Appellant contends, however, that the State is not functioning in a governmental capacity in the condemnation of his property, and that even though it were, it would be bound by the same procedure and would be liable for

the same measure of damages as any other person would be under similar circumstances. For the Legislature to attempt to use the State sovereignty for the purpose of defeating Appellant's claim for damages, and for the purpose of throwing Appellant into an improper tribunal, denies to him the equal protection of the laws and deprives him of his property without due process of law contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

In *Beveridge vs. Lewis*, 137 Calif. on p. 623, the Court said:

> "Can the Legislature provide that he (the owner) shall receive a smaller sum for the taking of the land when it is taken by a natural person than when it is taken by a corporation for precisely the same use, especially when the natural person may at once transfer his property to a corporation. • • • I think it must be answered that the Legislature cannot provide for the one case a less favorable rule than the Constitution has provided for the other. They are entitled to the equal protection of the law."
>
> "Now, there is absolutely no natural or reasonable distinction between different persons seeking to exercise the right of condemnation with respect to the measure of compensation for the land taken and damages for land not taken" id. (p. 632).
>
> "It is argued that even if the above propositions are, as a general rule, true, still they do not apply to the case of the exercise of the right of eminent domain. It is said that this right belongs to the State by virtue of its sovereignty, and that therefore the State may exercise the right with as much favoritism as it pleases. But the right to make laws upon the subject of eminent domain is no different from the right to make laws on any sub-

ject; the right to make laws at all is a sovereign power. But that power must be exercised within constitutional limits. The State could, no doubt, refuse to grant to any person the right to exercise the power of eminent domain, as it could refuse the right to a writ of attachment to anyone; but when it does legislate upon either subject, it must do so within the constitutional limitation against arbitrary discrimination" (p. 632).

The Court held that the statutes involved in the above case giving special privileges to some in eminent domain cases, while withholding them from others, denied to the persons who were discriminated against, the equal protection of the laws contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

In the case at bar the State is not condemning the property which it claims is necessary for the widening of Woodward Avenue, but it is acquiring Appellant's property for the use of another. It is admitted that neither the State nor any of its agencies will use Appellant's property for any purpose. The railway company is the one who devotes the property to its use. The State is using its governmental immunities and powers in the first instance to procure the property. In that way the railway company is obtaining the benefits of the sovereignty of the State of Michigan, while at the same time it is relieved of the burdens which are placed upon all other railway companies who condemn property. We contend that the exercise by the State of its sovereign powers against Appellant's rights, and for the benefit of the railway company, denies to the Appellant the equal protection of the laws and deprives him of his property without due process of law.

In the case of *Kessler vs. City of Indianapolis*, 199 Ind., 420, the City of Indianapolis, claiming to act in its govern-

mental capacity, attempted to condemn land, a part of which was to be used for park purposes, and a part of which was to be conveyed to a third party by the City.

The Indiana Supreme Court held that the resolution on behalf of the City, which attempted to appropriate land, a part of which was to be used by the City and a part of which was to be conveyed to another person by the City, was unconstitutional and void.

> "We believe that the inquiry of the courts is not limited alone to a consideration of whether the 'use'—'park purposes'—which a city assigns in its condemnation proceedings as the use to be made of the property, is or is not a public use, (if that were true there would really be no limitation on the power of cities to acquire property), but that a consideration may be had of all the surrounding facts and circumstances tending to show what is the actual, principal and real use to be made of the property."
>
> "The purpose for which private property is condemned is the very basis of the right to condemn." *Kessler vs. City of Indianapolis,* 199 Ind. Rep., p. 426.
>
> "The power of eminent domain may be exercised only for public purposes and not for a private purpose and the taking of private property for a private use violates the constitutional rights of the owner." id. (p. 427).

This case is of importance only because it shows that the mere naming of the project, for which Appellant's land is sought, a "highway project" is not controlling even though the State does so contend. This Court will go to the basic purpose for the taking of Appellant's property in determining which condemnation law should be applied.

We contend that the District Court below was in error when it said:

> "There is nothing in the Federal Constitution which prevented the State of Michigan from *the exercise of its own discretion and judgment in the adoption of the particular methods of enforcement of the right of eminent domain prescribed in the statutes here involved,*" 33 Fed., 2d, p. 920.

Appellant, therefore, submits that the District Court below was in error when it found that the State was functioning in a sovereign capacity when it undertook to condemn Appellant's property, and that the Court also was in error when it found that the State was taking Appellant's property for highway purposes.

Appellant also contends that when the State stepped in, in this particular instance, and attempted to act in a sovereign capacity, in order to defeat the rights of the Appellant, while carrying out the terms of a private contract, it thereby denied to the Appellant the equal protection of the laws and deprived him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

> "In the courts, parties similarly situated, are entitled to equal rights and privileges. The Constitution (equality clause) forbids discrimination between them." (In *Re City of Rochester,* 224 N. Y., 386.

Act 352 of the Public Acts of 1925 as Amended by Act 92 of the Public Acts of 1927, Being the "Highway Condemnation Act," Is Unconstitutional and Void.

It is the contention of all the Appellees that the Legislature intended that the "Highway Condemnation Act," being Act 352 of the Public Acts of 1925 as amended by

Act 92 of the Public Acts of 1927, should be used for the condemnation of Appellant's property. The Supreme Court of Michigan held, in the case of *Fitzsimons & Galvin vs. Rogers,* 243 Mich., on p. 665, that the Legislature intended that the "Highway Condemnation Act" should be used for the condemnation of property, pursuant to the terms of Act 340 of the Public Acts of 1927.

If the Legislature intended that the Highway Condemnation Act" should be utilized for the taking of Appellant's property by the State, for the purpose of trading it to the Detroit, Grand Haven & Milwaukee Railway Company, for railway use, then said Act is unconstitutional and void. It is well established that although a law be fair on its face, and impartial in appearance, yet if it be applied with an unequal hand and in a discriminatory manner, it will still violate the provisions of the Federal Constitution. *Yick Wo vs. Hopkins,* 118 U. S., 356.

Application of the "Highway Condemnation Act" to the taking of Appellant's property by the State Highway Commissioner as hereinbefore set forth, has deprived Appellant of the right to a jury trial upon the question of necessity and the question of compensation; the right to a railway condemnation tribunal; the right to demand a bona fide effort to purchase before his property could be condemned; the right to retain the title and possession of his property until compensation be first paid; the right to a general appeal to the Supreme Court of Michigan upon both questions of law and fact; the right to attorney fees and costs; the right to all of his damages without having benefits deducted therefrom; the right to consequential damages caused to the remainder of his tract.

All of the aforesaid rights and privileges have been denied to Appellant, while left in full force and effect as to

all other persons within the State of Michigan whose property could be condemned for railway purposes, and in that way the "Highway Condemnation Act" denies to Appellant the equal protection of the laws, and deprives him of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

It was said in the case of *Bogni vs. Petrotti*, 224 Mass., 152:

> "It is an essential element of equal protection of the laws that each person shall possess, unhampered, the right to assert in the courts his rights, without discrimination, by the same processes against those who wrong him as are open to every other person. The courts must be open to all upon the same terms. No obstacle can be thrown in the way of some which are not interposed in the path of others. Recourse to the law by all alike without partiality or favor, for the vindication of rights and the redress of wrongs, is essential to equality before the law" (p. 156).

Furthermore, if the "Highway Condemnation Act" is intended to cover a condition where private property is taken for trading purposes, it provides for a taking of property for a private use and not for a public use, and thereby deprives Appellant of his property without due process of law contrary to the aforesaid amendment to the Federal Constitution.

If the Legislature intended that the "Highway Condemnation Act" be applied in certain instances, when property is condemned for railway purposes, and intended that in other instances the "Railway Condemnation Act" be applied for the taking of property by condemnation for railroad purposes also, the Legislature thereby divided

the general class of persons whose property might be taken for railway purposes into two groups, and applied to each group a separate, distinct and different condemnation law. Such classification is unequal, arbitrary, and discriminatory, and not based upon any reasonable difference for the purpose of classification.

It was said in *Fountain Park Company vs. Hensler*, 199 Ind. 95:

> "The characteristics which can serve as a basis of a valid classification must be such as to show an inherent difference in situation and subject matter of the subjects placed in different classes which peculiarly requires and necessitates different or exclusive legislation with respect to them" (p. 102).
>
> "The Legislature cannot take what might be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered factions of the original unit as two classes, and thereupon enact different rules for the government of each" (p. 103).

When the State Legislature, arbitrarily split into two groups the general class of persons whose property could be taken by condemnation for railway purposes, and applied the "Highway Condemnation Act" to one group, including Appellant, it thereby arbitrarily deprived the members of this group of all the rights, privileges and immunities secured under the "Railway Condemnation Act," and thereby denied to this group the equal protection of the laws contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

We submit, therefore, that the "Highway Condemnation Act," being Act 352 of the Public Acts of 1925 as amended by Act 92 of the Public Acts of 1927 as unconstitutional and void, as applied to the taking of Appel-

lant's property in this instance, because it deprives him of his property without due process of law and denies to him the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

The Injunction Should Be Granted As Prayed For In Appellant's Bill of Complaint

It was firmly established in the case of *ex parte Young*, 209, U. S. 123, that the Federal Courts will restrain State officers from enforcing State statutes which are in derogation of rights guaranteed by the Fourteenth Amendment. If the statutes are found to be in conflict with the Federal Constitution, the Federal Courts will declare them void and ineffective, and will enjoin the execution thereof.

The State of Michigan is a sovereign State, and for that reason is protected from suit in any Court by the Eleventh Amendment to the Constitution of the United States. The State has never consented to be sued, and there is no tribunal wherein Appellant could present a claim against the State in case his property were illegally taken and destroyed by said State or its agencies.

It was firmly established in the recent case of *Ohio Oil Company vs. Conway*, 279 U. S. 813, that where, by execution of a State statute, injury to an individual will be certain and irreparable, and for which he will have no redress, a temporary injunction restraining the operation of the statute pending a hearing on the merits of the case should be granted. The Court spoke as follows:

> "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the

> final decree be in his favor, while if the injunction be granted, the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted."

This Court held in that case that the interlocutory injunction should be granted restraining the operation of a State tax statute claimed to be in derogation of rights guaranteed under the Fourteenth Amendment, because there was no remedy against the State in case the statute were later found to be unconstitutional.

In the case at bar, an interlocutory injunction should have been granted, pending a hearing on the merits of the case. The Appellees would have been inconvenienced in no way as a result thereof, because they had ample other property upon which to continue the work of constructing the railway.

All of the Appellees have been in possession of Appellant's property since the filing of the "Determination of Necessity" for the taking thereof, on the 19th day of April, A. D. 1928. The State has also claimed fee simple title to the property since that date. All of the Appellees and their agents and servants are now upon Appellant's property damaging the same in connection with the construction of the steam railway right of way and tracks and yards thereon, and said Appellees have there created holes and trenches and have made cuts and fills through Appellant's land, and have constructed tracks and trestles thereon, and have piled loose dirt thereon and have also cut standing timber and trees therefrom and have damaged Appellant's land by crossing and re-crossing it in connection with the aforesaid work; and now all of the said Appellees are threatening to damage Appellant's land by constructing thereon an elevated motor vehicle

highway above the tracks of the Detroit, Grand Haven & Milwaukee Railway Company. In the same manner all of the Appellees are now upon Appellant's property, causing great, immediate, continuing and irreparable injury thereto, which they will continue to cause unless restrained by a decree or order of this honorable Court. The damage already caused to Appellant's property is enormous, and he is certain to suffer greater damage in the future. If this Court does not interfere with its injunction, Appellant will suffer damages in excess of One Hundred Thousand Dollars ($100,000.00), for which he will have no recovery. The State will say: "I am a sovereign State and cannot be sued." The Detroit, Grand Haven & Milwaukee Railway Company will say: "We did not take your property; we got it from the State of Michigan." The H. W. Nelson Company will say that it was merely a contractor, doing work for the State of Michigan, and, therefore, it will claim the same immunities from suit which the sovereign State claims.

The State Highway Commissioner and the Detroit, Grand Haven & Milwaukee Railway Company are now actively engaged in producing testimony before the Court Commissioners for the purpose of assessing Appellant's damages. After these proceedings have been concluded and a judgment entered, Appellant will have no further remedy because the case will be forever closed against him. If the proceedings as aforesaid to take Appellant's property are not enjoined by this Court, or the District Court below, the title to said property will be permanently wrested from him, and he will be damaged in excess of One Hundred Thousand Dollars ($100,000.00), for which he will have absolutely no remedy against anyone.

SUMMARY

In conclusion, we submit:

1. That the District Court below was in error when it entertained Appellees' motions to dismiss along with Appellant's application for an interlocutory injunction; and that it was also in error when it dismissed Appellant's Bill of Complaint, denied his application for an interlocutory injunction and dissolved the temporary restraining order, and that the single District Judge had no authority to enter the order of the Court below without the assent of the other two Judges.

2. That Act 340 of the Public Acts of 1927 of Michigan and the contract embodied in Sec. 10 thereof places Appellant in an arbitrary, discriminate and unreasonable class not based upon any proper difference for the purpose of classification; that it suspends the operation of the "Railway Condemnation Act" as to Appellant, and applies to his case special laws not applicable to all persons in similar circumstances; that it authorizes arbitrary selection and classification by the State Highway Commissioner, when enforcing its provisions; that it authorizes the taking of Appellant's property by the State of Michigan for a use which is private, and not a public use, the purpose being to trade Appellant's property after it be acquired to the Appellee, the Detroit, Grand Haven & Milwaukee Railway Company for railway purposes; that it authorizes the taking of Appellant's property in this instance under the "Highway Condemnation Act," to be used for railway purposes, thereby denying Appellant the procedural rights, and denying him the measure of damages as provided under the "Railway Condemnation Act" and which are allowed to all other persons

within the State under similar circumstances; and that all of the provisions of Act 340, and the contract embodied therein deny to Appellant the equal protection of the laws and deprive him of his property without due process of law contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

3. That Act 215 of the Public Acts of 1925 of Michigan, places Appellant in a class which is arbitrary, discriminate and selective, and not based upon any reasonable difference which Appellant bears to the general class of persons whose property is desired to be taken for railway purposes; that it allows and authorizes the State Highway Commissioner to arbitrarily and discriminately select the mode of procedure to be used in condemning Appellant's property; that it allows the operation of two or more general laws to be applied in any given case where property is condemned under the provisions of Act 215; that the statutes allowed as alternatives provide for different methods of procedure, and allow the payment of different measures of damages; and that the State Highway Commissioner has adopted the statute providing for the most harsh procedure and the smallest measure of damages to be allowed Appellant for the taking of his property; that Act 215 provides for a taking of private property for trading purposes which purpose is not a public use, but which is a private use; and that all of such provisions deny to the Appellant the equal protection of the laws and deprive him of his property without due process of law contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

4. That Act 352 of the Public Acts of 1925 as amended by Act 92 of the Public Acts of 1927, being the "Highway Condemnation Act" as applied to the taking of Appellant's property is discriminatory, unequal, and arbitrary;

that if the Legislature intended that the provisions of the "Highway Condemnation Act" should be applied for the taking of property for railway use, then said "Highway Condemnation Act" denies to the Appellant equal access to the "Railway Condemnation Act" as enjoyed by all others under similar circumstances; that even though said "Highway Condemnation Act" be fair on its face, and constitutional if applied in the proper case, in this instance it is being applied in an arbitrary and discriminatory manner, and the action of the State Highway Commissioner in applying the "Highway Condemnation Act" to the taking of Appellant's property is also unconstitutional; that said "Highway Condemnation Act" is being applied to the taking of Appellant's property so as to deprive him of his constitutional rights both as to procedure and as to the measure of damages for the taking of his property, and that, therefore, said "Highway Condemnation Act" denies to Appellant the equal protection of the laws and deprives him of his property without due process of law contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

5. Appellant further submits that there is no necessity for the State to condemn his property for the purpose of turning it over, immediately, to the railway company for railway purposes; that the railway company has the right to condemn all property needed for its own use under the "Railway Condemnation Act," and when the State steps in and attempts to use its sovereign powers and rights in favor of the railway company and against Appellant, it thereby denies to the Appellant the equal protection of the laws. Furthermore, there can be no necessity for compensation by substitution in this instance, as there is ample land on either side of the highway for either the widening of said highway or the relocation of the railway.

PRAYER

Appellant, therefore prays:

That this Court reverse the decree of the District Court below, and either (1) grant the prayer and relief prayed for in Appellant's Bill of Complaint, or (2) direct the Court below to vacate its Order dismissing Appellant's Bill, and reinstate Appellant's Bill of Complaint, and issue the proper interlocutory injunction.

And that this Court will grant such other and further relief as it may deem necessary in the premises.

Respectfully submitted,

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APPENDIX

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Contract Between State of Michigan and the D. G. H. and M. Ry. Co..... 116

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Act 340 of the Michigan Public Acts of 1927

An act to authorize the State of Michigan to contract with the Detroit, Grand Haven & Milwaukee Railway Company for the surrender of its special charter; for acquiring by the state of a new right of way for said railroad company of approximately nine and one-tenth miles in length in Oakland County, including lands for station grounds and facilities at Birmingham; for the exchange of said new right of way and additional lands for said railroad company's present right of way and grounds adjacent to and in proximity to state trunk line highway number ten, known as Woodward avenue; for advancing the money to said railroad company to defray the cost and expense of grading said new right of way for a double track railroad; for the construction thereon of a single track railroad; for the connection of said new single track railroad with the present railroad tracks of said railroad company; for making grade separations; the reimbursement of the state by said railroad company for the money to be paid, laid out and expended by the state in acquiring said new right of way and additional land for said railroad company, and for the money to be advanced by the state in the first instance to said railroad company to defray the cost and expense incurred by the state under said contract; the surrender of the special charter of said railroad company; its reincorporation under the general railroad law of the state, and the payment of taxes by it after its reincorporation; to prescribe the manner of executing said contract, to create a revolving fund to carry out the terms and conditions of said contract; to provide for the disposition of said revolving fund; and to authorize the state to acquire, as a state project, by purchase or condemnation, for highway purposes, a right

of way not to exceed seventy feet in width along and adjacent and/or parallel to either or both sides of the new railroad right of way as a part of the proposed relocation and improvement, where and when deemed advantageous and/or necessary by the state administrative board.

The people of the State of Michigan enact:

Section 1. The governor of the State of Michigan is hereby authorized and empowered to negotiate with the Detroit, Grand Haven & Milwaukee Railway Company for a surrender of its special charter; its reincorporation under the general railroad laws of the state, and its taxation in accordance with the general laws of this state providing for the taxation of railroad companies; to acquire or cause to be acquired by the state highway commissioner a new right of way for said railroad company approximately nine and one-tenth miles in length, in Oakland County, Michigan. The governor, secretary of state and state highway commissioner are authorized and empowered to convey said new right of way to be acquired by the State of Michigan, on behalf of said state, to said railroad company; to make, execute and deliver proper deed or deeds of conveyance for the same in consideration of the release by said railroad company and the transfer and conveyance by it to the State of Michigan of the right of way now occupied by said railroad company between mile post number thirteen and mile post number twenty-two and one-tenth adjacent to trunk line number ten in Oakland County as provided in the form of contract annexed hereto and made a part hereof, so that the right of way of said trunk line highway number ten, known as Woodward avenue, may be widened to a width of two hundred feet for a distance of approximately nine and one-tenth miles in accordance with said contract. The

state highway commissioner is hereby authorized and empowered to acquire by purchase or condemnation, as a state project, a right of way not to exceed seventy feet in width along and adjacent and/or parallel to either or both sides of the new railroad right of way as a part of the proposed relocation and improvement where and when deemed advantageous and/or necessary by the state administrative board.

Sec. 2. In case said contract shall be successfully negotiated, then and in such case there shall be created on behalf of the state, a revolving fund into which the state administrative board or its successors in authority shall pay or cause to be paid such sum or sums of money as shall from time to time in its opinion be necessary to pay, for acquiring the new right of way and additional lands necessary to carry out said contract, and to pay said railroad company for the performance of the work and the furnishing of the materials as provided in said contract; the state administrative board is authorized and empowered to loan to said revolving fund on the security of said contract, any such sum or sums of money as shall or may be necessary from the sinking fund created to retire state highway bonds; such loan or loans to pay interest at the rate of four and three-tenths percent per annum. Such interest to be charged against and to be a first lien on and payable out of any moneys in the state highway fund not otherwise specifically appropriated, and shall be charged against the cost and expense of widening and improving said trunk line highway number ten, known as Woodward avenue. All payments which shall or may be made by the Detroit, Grand Haven & Milwaukee Railway Company under and in pursuance of said contract, to reimburse the state for moneys advanced by it and paid, laid out and expended by it, or by said railroad company from moneys

advanced by the state in the first instance, shall be paid into said revolving fund until all of the expenditures required to be made by the state and the state highway commissioner in the first instance under said contract shall have been made, and the obligations thereby created shall have been paid, and all loans to said revolving fund shall have been fully paid.

Sec. 3. When the moneys which shall have been advanced in the first instance by the state in pursuance of said contract to said railroad company, and all moneys expended by the state or the state highway commissioner for which the state or the state highway commissioner is to be reimbursed by said railroad company under the terms of said contract, through said revolving fund shall have been fully paid by said railroad company to the state in accordance with the terms and conditions of said contract, then such moneys shall be retransferred by the state administrative board, or its successor in authority, from said revolving fund to be created, to the funds belonging to the state from which the same were taken in the first instance.

Sec. 4. The changes and improvements contemplated by this act and said proposed contract and the taking of the new lands described in said contract for the new right of way of said railroad company, including the additional lands described therein necessary for depot and yard purposes at Birmingham and all other lands necessary or required to carry out this act and said proposed contract, are hereby declared to be a public necessity, and the state highway commissioner is hereby authorized and empowered to acquire the same on behalf of the state by purchase or condemnation, in accordance with the general laws of the State of Michigan.

Sec. 5. The deed or deeds of conveyance of the new right of way for said railroad to be acquired by the state, and of such additional lands as shall be necessary to be acquired in accordance with said contract for station grounds and other purposes at Birmingham as specified in said contract, are to be conveyed by the state to said railroad company for railroad purposes; and the deed or deeds for the same shall be executed on behalf of the state by the governor and attested by the secretary of state and approved by the state highway commissioner.

Sec. 6. Said contract when made and entered into by the parties thereto and properly executed as provided therein, shall be valid and binding upon the parties thereto, their successors and assigns, conditioned however, upon the faithful performance of the terms and conditions thereof by the parties thereto.

Sec. 7. Said contract shall provide that when the terms and conditions thereof shall have been carried out, said Detroit, Grand Haven & Milwaukee Railway Company shall surrender its special charter, reincorporate under the general laws of the State of Michigan providing for the organization of railroad companies, and thereafter pay taxes without discrimination under the general laws of this state providing for the taxation of the property of railroad companies.

Sec. 8. Said contract shall provide that the railroad company shall repay to the State of Michigan all money advanced by the State of Michigan or the state highway commissioner in acquiring the right of way for said railroad company and in paying said railroad company, in the first instance, for doing and performing the work and in furnishing the materials contracted by it to be performed and furnished, at the times and in the amounts

and in the manner following: On the thirty-first day of December, in the year that the state shall have acquired control of the new right of way herein provided to be procured, the railroad company shall pay to the state the sum of two hundred fifty thousand dollars, and on each succeeding thirty-first day of December thereafter the further sum of two hundred fifty thousand dollars: PROVIDED, HOWEVER, That when the actual cost of carrying out said contract in its entirety shall have been ascertained, then the railroad company shall pay to the state a sum equal to one-fifteenth of said total actual cost, plus or minus the amount of over-payment or under-payment that shall have been made by said railroad company; And PROVIDED FURTHER, That said railroad company shall repay to the state all of the money paid, laid out and expended under the terms and provisions of said agreement within fifteen years after the first payment by it made, as herein provided. Said contract shall provide that no interest charge shall be made or accepted by the state on account thereof, except on past due installments, if any, and then at the rate of five percent per annum.

Sec. 9. The governor, for and on behalf of the State of Michigan, is hereby authorized to make such modifications in said contract as shall be provided for therein and the money necessarily paid out and expended in making the changes provided for in such modifications shall, in the first instance, be advanced by the state and the state shall be reimbursed therefor by the railroad company, in accordance with the terms of said contract.

Sec. 10. The form of said proposed contract between the State of Michigan and said railroad company is as follows:

THIS CONTRACT AND AGREEMENT, made and entered into by and between THE DETROIT, GRAND HAVEN

AND MILWAUKEE RAILWAY COMPANY, party of the first part, hereinafter called the "Railway Company," and THE STATE OF MICHIGAN, party of the second part, hereinafter referred to as the "State," WITNESSETH, as follows:

WHEREAS, The Detroit, Grand Haven & Milwaukee Railway Company is a corporation organized and existing under and by virtue of a special charter granted by the territorial council of the territory of Michigan, March seven, eighteen hundred thirty-four, and acts amendatory thereof and supplementary thereto, under which said statutory special charter said railway company pays annually a fixed percentage of its capital stock paid in as taxes to the state, and at the present time is paying annually twenty-five thousand one hundred seventy-one dollars and forty cents ($25,171.40); and

WHEREAS, the validity of said special charter of said railway company has been attacked from time to time by the state, in the courts of this state, and the validity of said special charter has been upheld by the Supreme Court of this state, and the Supreme Court of the United States; and

WHEREAS, The State of Michigan has for many years sought to procure the surrender of all of the special charters of all of the railroad companies in the State of Michigan, and to have said railroad companies incorporate under the general laws of the State of Michigan providing for the organization and incorporation of railroad companies and to pay the same rate of taxes to the state upon the true cash value of their taxable property, but that the said railway company has refused to surrender its special charter and to incorporate under the general railroad law, and to pay taxes upon the value of its taxable property in accordance with the general law of said state

providing for the taxation of the property of railroad companies; and

WHEREAS, the state is desirous of acquiring the right of way of said railway company extending from the railway company's mile post number thirteen in Royal Oak to the railway company's mile post number twenty-two and one-tenth between Pontiac and Birmingham, for the purpose of enabling the state to carry out its highway program, and to widen to two hundred feet the right of way of the public highway running substantially parallel to said right of way of said railway company, and known as Woodward avenue, and to have said railway company remove its tracks and equipment from said right of way; and

WHEREAS, said railway company executed in its own behalf by its president, attested by its secretary, a contract, which said contract was submitted to the legislature of the State of Michigan for its ratification and approval, at the extra session of the legislature convened in nineteen hundred twenty-six; and

WHEREAS, the legislature of the state, by act number one, of the public acts of the extra session of nineteen hundred twenty-six, approved in all respects said contract, and authorized the governor and the state highway commissioner to execute the same upon the part of the State of Michigan, attested by the secretary of state; and

WHEREAS, after said contract was so executed on behalf of the said railway company and submitted to the legislature of the state and approved by it, and the governor and the state highway commissioner were authorized to execute the same on behalf of said state, to be attested by the secretary of state, said contract was materially changed from the terms of the contract executed by said

railway company and submitted to the legislature of the state; and

WHEREAS, the plans and specifications attached to the contract executed on behalf of said railway company and on behalf of the state on September two, ninteen hundred twenty-six, were altered and amended subsequent to the passage by the legislature of the state and the approval by the governor, of act number one, of the public acts of the extra session of nineteen hundred twenty-six, and that by reason of the changes made in material parts of said contract after the approval of the same by the legislature by act number one of the public acts of the extra session of nineteen hundred twenty-six, said contract is claimed by the State of Michigan to be of doubtful validity, although the railway company does not admit any such invalidity, said amendments, additions and alterations made in and to said contract not having been ratified by the legislature of the state, and both parties to said contract desiring to obviate, as far as possible, any question of the validity of the same which might or could be raised on account of such modifications subsequent to its ratification and approval by the legislature of the state; and

WHEREAS, said railway company and the state have entered into negotiations which have resulted in the making of a new contract and agreement and the setting aside and cancellation of the contract and agreement made and entered into on September two, nineteen hundred twenty-six, and on file in the office of the secretary of state of the State of Michigan, subject to the ratification and approval of the same by the legislature of the State of Michigan and by the board of directors of said railway company;

Now, therefore, it is hereby agreed by and between the said railway company, party of the first part, and the State of Michigan, party of the second part, as follows:

1.

That the contract and agreement heretofore made and entered into under date of September two, nineteen hundred twenty-six, and filed in the office of the secretary of state of the State of Michigan, on the third day of September, nineteen hundred twenty-six, whether valid or invalid, be and the same is hereby cancelled, set aside and held for naught, on the approval of this contract by the legislature and its execution as herein contemplated.

2.

That the State of Michigan shall, upon the ratification, approval and execution of this contract by the parties thereto, as required by law, proceed with all convenient speed to procure or cause to be procured a new right of way one hundred feet wide for said railway company for the purpose of constructing thereon a new double track railroad, as and where provided in this contract, and the state shall, in the first instance, advance the money to defray the expense of procuring the same.

3.

Immediately after the ratification, approval and execution of this contract by the respective parties thereto as herein provided, said railway company shall, upon the new right of way being procured by the state, at once take charge of and construct with all convenient speed upon said new right of way so to be procured, a single track railroad, together with the necessary grade separations and approaches, sidetracks, switches, incidents and

appurtenances, in accordance with the plans and specifications annexed to the contract made and entered into September two, nineteen hundred twenty-six between the parties hereto and filed in the office of the secretary of state of the State of Michigan on September three, nineteen hundred twenty-six, which plans, specifications and blueprints are made a part hereof, except as herein modified or as they shall hereafter be modified as provided herein.

4.

That said railway company, upon the completion of its railroad upon said new right of way, shall remove its railroad tracks and equipment from the old right of way now occupied by it between the points herein designated, and the state, upon the removal of said tracks and equipment of said railway company by said railway company from said right of way, may at once take possession of the same and use and improve the same, including the railway company's present right of way through Birmingham, for highway purposes, and said railway company agrees to make, execute and deliver to the state all such deeds, releases and conveyances as shall or may be deemed necessary, requisite and proper to convey the same to the state, but there shall not be conveyed to the state, by the railway company any lands between said points other than its old right of way, and such parts of other lands owned by said railway company as shall be necessary to be acquired by the state to widen said Woodward avenue to a width of two hundred (200) feet.

5.

Upon the carrying out of this contract, and the removal of said railway tracks by said railway company from the old right of way to the new right of way, or the building

of new tracks on said new right of way by the railway company, and the payment to the State of Michigan by said railway company in full for the cost and expense incurred by the state under this contract, said railway company shall forthwith surrender its special charter and any and all rights which it now has or claims to have thereunder, and incorporate under the general laws of the state providing for the incorporation of railroad companies, and transfer any and all assets of said railway company as it exists under said special charter, together with all additions to and replacements of its property, to said railway company to be incorporated under the general laws of the state providing for the incorporation of railroad companies. That said railway company shall, upon the surrender of its special charter as above set forth, thereafter be assessed for taxes in the State of Michigan, without discrimination, under the general tax laws in force in said state, from time to time, providing for the taxation of the property of railroad companies.

6.

The deed or deeds of conveyance from the persons owning the lands to be acquired by the state for the new right of way of said railway company, shall be taken in the name of the State of Michigan, and when the state shall have acquired the title to all of said right of way and said railway company shall have completed the work to be by it done under this contract, the same shall be conveyed by the state to said railway company, and the governor of the State of Michigan is hereby authorized and empowered to make, execute and deliver said deed or deeds of conveyance on behalf of the state, the same to be attested by the secretary of state of the State of Michigan, and acknowledged by them and each of them under the great seal of the state.

7.

The railroad company shall repay to the State of Michigan all money advanced by the state, or the state highway commissioner, in acquiring the right of way for said railroad company and in paying said railroad company, in the first instance, for doing and performing the work and in furnishing the materials contracted by it to be performed and furnished at the times and in the amounts and in the manner following: On the thirty-first day of December, in the year that the state shall have acquired control of the new right of way herein provided to be procured, the railroad company shall pay to the state the sum of two hundred fifty thousand dollars, and on each succeeding thirty-first day of December thereafter the further sum of two hundred fifty thousand dollars: Provided, however, that when the actual cost of carrying out said contract in its entirety shall have been ascertained, then the railroad company shall pay to the state a sum equal to one fifteenth of said total actual cost, plus or minus the amount of over-payment or under-payment that shall have been made by said railroad company: And provided further, that said railroad company shall repay to the state all the money paid, laid out and expended under the terms and provisions of said agreement within fifteen years after the first payment by it made, as herein provided. It is expressly understood and agreed that no interest charge shall be made or accepted by the state on account thereof, except on past due installments, if any, and then at the rate of five per cent per annum.

8.

The state, acting through its state highway commissioner and with the assistance of the railway company,

agrees, at its entire initial expense, but to be fully repaid as hereinafter provided, to acquire by purchase, condemnation or otherwise a one hundred foot right of way, hereinafter referred to as the new right of way, together with such additional width as and where necessary to provide for proper cuts, fills and drainage for the proper development of said one hundred foot right of way for railroad purposes, between the aforesaid points, on the route designated on the blueprints, dated October four, nineteen hundred twenty-six, identified by the signature of the state highway commissioner and the chief engineer of the railway company, which are on file with the parties hereto and which are hereby made a part hereof, it being understood that the portion of the old right of way at or near said mile post thirteen, which lies within the new right of way, shall continue as part of the latter, and that the portion of the old right of way from said mile post twenty-two and one-tenth to mile post twenty-one and thirty-five one hundredths which lies within the new right of way, shall continue as part of the latter; also to likewise acquire the necessary additional land for station grounds at Birmingham, on the altered and relocated route, including that necessary for depot, freight house, team tracks, passing tracks, and other usual and necessary appurtenances such additional land to be four thousand feet in length and approximately three hundred feet in width, including said one hundred foot right of way, as indicated on said blueprints.

(a) It is understood and agreed that the acquisition of said new right of way and other lands shall be promptly commenced, prosecuted and completed, and that such acquisition shall be under the joint supervision of the state highway commissioner and the said railway company's chief engineer; they shall jointly appoint competent agent or agents to conduct the negotiations for

such right of way and other lands, and shall have full authority to fix the compensation of such agent or agents, and to discharge them at any time. No purchases shall be made except on the joint approval, in writing, of said state highway commissioner and chief engineer, and should either disapprove of the price of any proposed purchase, then the same shall not be concluded, but the land therein involved shall be acquired by condemnation. When condemnation is necessary, proceedings therefor shall be instituted and conducted in behalf of the state, by its proper officers, but with the right in the railway company, through its attorney or attorneys, and other representatives, to participate in such proceedings. All expenses involved in such acquisition, including detailed surveys and map work, therefor, shall be considered and treated as a part of the cost thereof, except that there shall not be included in such expenses any allowance for the services of the said state highway commissioner or chief engineer, or the attorneys for the parties.

(b) If the state highway commissioner, in the purchase of said new right of way and other lands, finds it expedient or necessary to purchase more land, adjacent to any part thereof, than may be actually required, it is understood and agreed that he may do so, provided such purchase shall be approved, in writing, by the said railway company's chief engineer. and that the cost of such additional land shall be considered and treated as part of the cost hereunder, and that the surplus land, either the whole or any part thereof, shall be disposed of on the best terms obtainable, at such time or times as the state highway commissioner and said chief engineer may deem expedient, if such disposition is prior to the making and delivery of the exchange deeds herein provided for, the state highway commissioner and said chief engineer to approve, in writing, each and every proposed disposition thereof, and

the net proceeds thereof shall be credited to the cost hereunder. If such disposition of any part of such surplus lands has not been made prior to such exchange deeds, then any remaining portion thereof shall be included in the deed to the railway company, and it shall thereafter be the sole owner thereof.

(c) Evidences of good, merchantable title to said new right of way, and other land, in the form of abstracts or otherwise, shall, from time to time, as said right of way and other land is acquired, be furnished by the state highway commissioner to the railway company, and the cost and expense thereof shall be deemed a part of the cost of said right of way.

9.

The railway company agrees, at the entire initial expense of the state, but to be fully repaid, as hereinafter provided, to itself do, or cause to be done by letting on contract to a contractor or contractors, all the work, including the furnishing of all materials for the grading of said new right of way, for a double track railroad, including all necessary drainage structures; also including the separating of the grades and crossing protection at the railroad crossings specified in general plans herein mentioned; also including the construction on said new right of way of a single track railroad, with necessary appurtenances, including construction on new right of way of telegraph pole lines and wires and other telegraph facilities of like kind as those now existing on old right of way; and also including facilities on new station grounds at Birmingham of like kind as those now existing on old station grounds, all on the grade and according to the general plans and specifications annexed to the contract dated September two, nineteen hundred twenty-six,

and filed in the office of the secretary of state, September third, nineteen hundred twenty-six; detailed plans and specifications to be prepared by the railway company as the work progresses, the expense thereof to be considered and treated as part of the cost of the work hereunder, all to be of the standard of first class for a modern railroad, not less than required by law; said work to be commenced and prosecuted with reasonable diligence after the new right of way has been acquired; Provided, that the railway company, at its option, may, before said new right of way has been fully acquired, commence and prosecute such work in any section where sufficient of the new right of way has been acquired to permit of expeditious and economical work.

(a) It is understood and agreed that the state highway commissioner, with the assistance of the railway company, shall procure any and all necessary public approval for the work to be done hereunder; and that the railway company, with the assistance of the state, shall procure any and all necessary approval from the interstate commerce commission for the abandonment of its old rights of way and relocation on its new right of way; and that any damages and/or expenses arising out of the carrying out of this contract shall be considered and treated as a part of the cost thereof.

(b) When the single track with appurtenances has been constructed as aforesaid, the railway company shall physically connect the same with its railroad at said mile posts thirteen and twenty-two and one-tenth, the expense thereof to be considered and treated as part of the cost of the work hereunder.

(c) It is understood that it shall be optional with the railway company to itself perform any or all of the work hereby provided for, or to let the same on contract to a

contractor or contractors. As to work which the railway company elects to let to a contractor, it shall procure proper bids of contractors, and will award the work to contractor or contractors at prices which shall first have been approved, in writing, by the state highway commissioner, and will make the necessary contract or contracts with the contractor or contractors, and pay for the work and materials by monthly estimates.

(d) It is understood and agreed that the railway company shall appoint a competent engineer to have general charge and supervision of the work herein provided for, both that performed by the railway company itself, and that performed by contractors, subject to the provisions hereof, and that he shall have authority to employ necessary assistants, including inspectors, and that the expense of such engineer, assistants and inspectors, including salaries or wages, field office, supplies, or any other items necessarily incident to said work, shall be considered and treated as a part of the cost of the work.

(e) It is understood and agreed that, as to work performed by the railway company itself, there shall be added to the cost of all materials furnished by its from stock to accomplish such work, fifteen per cent to cover the expenses of handling in transit, freight charges accruing on materials (the shipment of which originates on lines of railway companies comprising the Grand Trunk railway system), accounting, and other like overhead expenses which it is impracticable to allocate; it being understood that all other materials shipped for use in such work are to be purchased f. o. b. Royal Oak or Birmingham, for delivery at such place there as may be designated by the railway company, and said fifteen per cent shall not apply to any material so purchased.

(f) To the cost of all labor, performed by the railway company itself, including foremen, there shall be added ten per cent to cover the cost of accounting, use of small tools, and other like overhead expenses, which it is impracticable to allocate.

(g) It is further understood and agreed, that, as to work performed by contractors for the railway company and as to materials purchased f. o. b. Royal Oak or Birmingham, as aforesaid, there shall be added to the cost thereof, as fixed by contract, one per cent to cover the cost of advertising for bids, letting contracts, accounting, and other like overhead expenses which it is impracticable to allocate.

(h) It is further understood that the railway company will be required to furnish certain equipment for use in such work, and it is agreed that for equipment owned or controlled by it, or by companies comprising the Grand Trunk railway system, rental may be charged, and included in the cost of the work, such rental to be reasonable and according to the prevailing charges for like or similar purposes, and also other expenses contracted therewith, as well as the actual rental and other expenses paid for equipment leased from outside parties.

(i) The railway company shall monthly render to the state highway commissioner, acting for the state, bills covering the cost to it for the preceding month, including all expenditures made hereunder, which are chargeable to the cost of the work, whether for work by itself performed, or for work performed by contractors for it, according to estimates to be made by the railway company's chief engineer, the state highway commissioner or his representatives to have access to all the railway company's records pertaining to such work for the purpose of checking the same, and the state agrees to pay such

monthly bills within thirty days from the date of rendition; if not paid within thirty days after rendition, said bill or bills shall bear interest at the rate of five per cent per annum until paid; and said bills, together with accrued interest thereon, shall be deductible from the next succeeding annual payment or payments under paragraph seven hereof if not paid by the state before such payments become due; such accrued interest, if any, thus deducted shall not be considered and treated as a part of the cost of the work to be repaid by the railway company under said paragraph seven.

(j) When the construction aforesaid, including the furnishing of the materials, and also including the physical connection of said new single track with the railway company's railroad at mile posts thirteen and twenty-two and one-tenth, as aforesaid, is completed, the railway company shall promptly remove the physical materials, such as rails, ties, etc., from the old right of way, and the fair, net value thereof, with proper allowance for depreciation and expense of removal, as specified in the schedule annexed to the contract dated September second, nineteen hundred twenty-six, and filed in the office of the secretary of state, September third, nineteen hundred twenty-six, shall then be credited to, and deducted from, the total cost incurred by the state hereunder.

10.

This contract shall inure to and be binding upon the respective successors and assigns of the parties hereto, and in event said railway company consolidated with, leases or sells its railroad and other property to any other railroad company, whether of the Grand Trunk railway system, or otherwise, the rights, duties and obligations of the parties hereunder shall run with such railroad and

other property without loss or waiver thereby of any of the same, and the consolidated, purchasing or lessee railway company shall hold the same with all rights and obligations pertaining thereto hereunder, including the obligation and the right to make the payments herein specified without further responsibility for taxes in addition to the annual sum of twenty-five thousand one hundred seventy-one dollars and forty cents ($25,171.40) until the time shall have expired for the making of such payments in full to the state by said railway company, as herein specified; said railway company is not to obtain, however, an extension of the time herein specified, at which it is to come under the general railroad laws of the state for the purposes of taxation, nor be longer exempted from taxation under the general laws of the state providing for the taxation of railroad companies, by reason of any default in performance, or failure to pay, as herein provided, upon its part.

11.

Should any dispute arise between the parties hereto involving any matters herein it shall be submitted to a committee composed of the governor of the State of Michigan, the president of said railway company, and a third person, to be selected by them. In the event that the governor of the State of Michigan and the president of the Detroit, Grand Haven and Milwaukee Railway Company shall be unable to agree upon a third arbitrator, the then senior judge of the United States District Court, for the eastern district of Michigan, shall select such third arbitrator upon the written application of either party. Said committee shall fix a time and place of hearing giving reasonable notice to the parties, who shall have the right to introduce such evidence and arguments as may be deemed proper, and the decision of a majority of said

committee shall be final and conclusive as to the matter submitted to them. The expense of such arbitration shall be borne by the parties hereto equally, provided such committee may, in its discretion, otherwise apportion such expense.

If at any time after the execution, ratification and approval of this contract it shall be deemed necessary and advisable by the state to make additional grade separations along the line of said new right of way, in addition to the grade separations provided for in the plans and specifications herein referred to and made a part of this contract, said additional grade separations shall be made and the expense thereof be paid, as provided by the general laws of the State of Michigan governing the separation of grades at railroad crossings.

13.

The state reserves the right to change or relocate the new right of way herein specified, with the consent of the chief engineer of said railway company, but in the case of such change of location of new right of way, the grade thereof shall conform substantially to the grade herein referred to and provided for, and the cost of securing said right of way and of paying for the same, shall be ascertained, fixed and paid as herein provided, but nothing herein contained, if it may change the total amount to be paid, laid out and expended by the state, shall change, modify or extend the time within which said railway company shall pay and reimburse the state in full for any and all moneys paid, laid out and expended by it in carrying out and performing the terms and conditions of this contract, incumbent on its part to be carried out and performed by it.

14.

This contract and agreement shall not be binding until it shall have been ratified and approved by the legislature of the State of Michigan, signed on behalf of said state by the governor, attested by the secretary of state, under the great seal of the state, and signed by the state highway commissioner, and until the same shall have been executed on behalf of said railway company by its proper officers.

15.

The state, on the carrying out and fulfilling of this contract by the parties hereto, expressly abandons and fully relinquishes any right it has, or now claims to have, to purchase or otherwise acquire the railroad and/or other property of the railroad company, under the special charter or otherwise.

In Witness Whereof, The Parties hereto have caused this contract to be executed in quadruplicate, in their corporate names, by their respective duly authorized officials, this ..... day of ....., A. D. 1927.

STATE OF MICHIGAN,

By .....
Governor.

Attest: .....
Secretary of State.

.....
State Highway Commissioner.

DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY,

By .....
President.

Attest: .....
Secretary.

Act 215 of the Michigan Public Acts of 1925

An act to authorize and empower the state highway commissioner to purchase or condemn property to exchange for the right of way, or a part thereof, of railroads, and railways, when such right of way, or part thereof, is necessary to be acquired for widening, straightening, altering or otherwise improving a trunk line highway, and to make such exchange.

The People of the State of Michigan enact:

Section 1. Whenever the line of any railroad or railway company is upon or adjacent to the right of way of a trunk line highway and such right of way or any part thereof, is necessary to be acquired for widening, straightening, altering or otherwise improving such highway, the state highway commissioner shall be authorized to enter into negotiations with such railroad or railway company for the purchase of said right of way, or of any part thereof, and to enter into an agreement with any such railroad or railway company to exchange other designated property for such right of way, or for any part thereof, whenever such other designated property shall be acquired by him; and whenever any such agreement has been entered into, the said state highway commissioner shall be authorized and he is hereby empowered to acquire such other property by purchase or condemnation, and when acquired to execute the necessary conveyances and releases thereof to such railroad or railway company for its use, and to take in exchange therefor the railroad or railway right of way or part thereof for such public highway purposes in accordance with such agreement.

Sec. 2. The procedure that is, or may be, prescribed for condemnation proceedings instituted by boards of county

road commissioners or the procedure that is, or may be, provided for the condemnation by state agencies and public corporations of private property for the use or benefit of the public, is hereby expressly made applicable to any proceeding brought by the state highway commissioner under the provisions of this act.

Sec. 3. Whenever any property shall be acquired by the state highway commissioner under and by virtue of the provisions of this act, the consideration or compensation to be paid therefor shall be paid out of the state highway fund in five equal annual installments.

This act is ordered to take immediate effect.

Approved May 6, 1925.

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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1929

No. 338

FRANK H. DOHANY,

Appellant,

vs.

FRANK F. ROGERS, State Highway Commissioner for the State of Michigan, et al.,

Appellees.

REPLY BRIEF OF APPELLANT

FRANK H. DOHANY, *pro se,*
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Detroit, Michigan.

CONWAY-SCOTT COMPANY, LAW PRINTERS, DETROIT, MICH.

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IN THE

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No. 338

FRANK H. DOHANY,

Appellant,

vs.

FRANK F. ROGERS, State Highway Commissioner for the State of Michigan,

DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, a Michigan Corporation, and

THE H. W. NELSON COMPANY, of Chicago, Illinois, a foreign corporation,

Appellees.

APPELLANT'S REPLY BRIEF

Pursuant to leave granted at the conclusion of Appellant's oral argument in this cause, Appellant files this, his Reply Brief.

DEDUCTION OF BENEFITS

It will be recalled that on the oral argument, Mr. Justice Butler put the following questions to Mr. Clardy, the Assistant Attorney General, and received the following answers:

> Q. Is it your contention that under the Highway Act benefits can be deducted?
>
> A. Yes.
>
> Q. Is it your contention that under the Railway Act benefits cannot be deducted?
>
> A. Yes.

Mr. Clardy further assured this Court that benefits would not be deducted, and that this Appellant would be afforded the advantages of the same measure of damages under either condemnation act.

A reference to Appellant's sworn Bill of Complaint (Rec. pp. 8 and 9) which must be accepted by this Court as the facts upon which to predicate its opinion, discloses that benefits were deducted by the State Highway Commissoner, from the damages which in his opinion should be paid to the Appellant for the taking of his property as follows:

> "No. 3. That the description of each of said parcels of land to be acquired for said public highway purpose as aforesaid, the damages which, in my opinion, should be paid as compensation for the taking of each parcel of such property, *after deducting benefits accruing to the owners of each of said parcels of land by reason of the improvement*, as hereinbefore indicated, and the name of each person interested in each

such parcel, so far as known, are as follows: * * *

Property of Frank H. Dohany * * *

Owner: Frank H. Dohany.

Damages $23,562.50 (Rec. pp. 8 and 9).

The damages above indicated were a tentative amount, which the Highway Condemnation Act required the State Highway Commissioner to deposit upon making his determination of necessity for the taking of lands, under the Highway Condemnation Act, and these damages would be paid to the property owner as his damages, in case he took no further part in the proceedings before the three Court Commissioners.

Not only do we find that the State Highway Commissioner, deducted benefits when determining the damages, which in his opinion, should be paid to Appellant for the taking of his property, but also that he failed to include any amount for consequential damages to the remainder of Appellant's property. He was proceeding under Sec. 4 of the Highway Condemnation Act, which provides, among other things, as follows:

> "Whenever the Commissioner shall be unable to agree with any person for the purchase thereof, the Commissioner may make a written determination of the necessity of the particular road construction project for which such property is desired, the necessity for taking the particular property described, and the damages which, in the opinion of the Commissioner, should be paid as compensation for the *taking* of each parcel of such property. * * *"

It further appears from the record (p. 9) that the acreage taken from Appellant was 7.250, and that the

damages to Appellant, in the opinion of the Highway Commissioner, were $23,562.50. By dividing the latter by the former, we find that Appellant was allowed exactly $3,250 per acre for the land actually taken, after deducting benefits, as above set forth, in said Determination, and was given nothing as consequental damages to the remainder of his tract. This supports our contention that the Highway Commissioner followed literally the requirements of the Highway Condemnation Act, in fixing the damages, which in his opinion, should be allowed to Appellant for the taking of his land for railway use.

So here we find, notwithstanding the replies of Mr. Clardy to the interrogations of this Court, that the State Highway Commissioner did deduct benefits from the damages which in his opinion should be paid to Appellant, although it is conceded by Mr. Clardy that the Highway Commissioner would have had no right to do so under the Railway Condemnation Act. After the State Highway Commissioner filed his Determination of Necessity, stating the damages, which in his opinion, should be paid to Appellant, he then claimed the absolute fee simple title to Appellant's land, and took possession thereof in accordance with the Highway Condemnation Act. It is only fair to assume, in view of his former attitude, that the Highway Commissioner will ask the three Court Commissioners to deduct benefits when fixing Appellant's damages, in conformity with the Highway Act.

Furthermore, under the Railway Condemnation Act not a sod could have been turned on Appellant's land until an award, by a jury, including consequential damages, and from which benefits had not been deducted, had been deposited with the Oakland County Clerk;

while, on the contrary, in this proceeding under the Highway Act we find Appellant already deprived of his property for a period of two years, and the grading completed through the same.

We find the following statement on page 84 of the Attorney General's brief in behalf of Appellee Rogers:

> "*Thus far in the proceedings* the State has made no attempt to ask the Commissioners to consider any *benefits* that may accrue to appellant's property, and the State has been offering proof without any reference to such benefits."

It will be noted the Attorney General did not say that in the future no testimony *would* be taken on the question of benefits. It has been his contention all the way through this proceeding, and he so stated to this Court, that under the Highway Act under which the proceedings were brought, the benefits could legally be deducted. Any oral statement which Mr. Clardy has made here to the contrary, will not be binding upon him in the proceeding before the three Court Commissioners assessing Appellant's damages. Furthermore, the three Court Commissioners who are now assessing Appellant's damages, are the sole judges of both the law and the facts in the case. The Attorney General nor anyone else can prevent them from deducting benefits from Appellant's award, in keeping with the Highway Condemnation law in the proceeding under that Act. Suppose the Attorney General should turn about face and decide that under the law he was bound to present testimony on behalf of the State Highway Commissioner to disclose any benefits which might arise to Appellant's lands by the construction and operation of the railroad? Appellant would have no further remedy, because our State Supreme Court of

Michigan has held that the Highway Condemnation Act has been properly applied for the taking of Appellant's property in this instance.

Notwithstanding the broad statement of Mr. Clardy before this Court that benefits would not be deducted from Appellant's damages, we submit that the testimony of his experts discloses that benefits have been considered by them. The witness gave his opinion as to the value of the remaining property, per acre, before the taking. Then he gave his opinion as to the value of the remaining property, per acre, after the taking, which in his opinion was the same figure as before the taking. Upon cross examination the witness stated that his first valuation was based upon the use of the property for *residential purposes.* The witness further stated that his valuation, fixed upon the property after the taking, was based upon its value for *Industrial or business uses, which would arise after the construction and operation of the railroad.* Then finally the witness was asked what in his opinion the depreciation of the property for *residential purposes* would be as a result of the relocation of the railroad. To this question he answered, approximately 33 1-3 per cent depreciation.

It is obvious from these statements, that the witness based his valuation on the property, *for residential use,* before the taking, and *upon industrial use,* after the taking. He therefore considered the benefits, arising from the construction and operation of the railroad, in fixing the damages.

Although the Attorney General insists that he is not asking the Commissioners to deduct benefits from the award, we submit that the above rule which he is applying, clearly indicates that his witness considered bene-

fits, and that the opinion of the witness in fixing the damages, took into consideration such benefits. Therefore, there is now testimony, in the record before the Commissioners, which testimony was introduced by the Attorney General, and is based upon benefits which were considered by the witness.

Although the Attorney General insisted before this Court that he is not asking the Commissioners to deduct benefits from Appellant's award, we submit that the above rule which he is applying clearly establishes the fact that benefits were considered by his witness, and that the opinion of his witness was based upon the consideration of such benefits.

Under the Railway Condemnation Act, such testimony would be clearly incompetent, and the Court would strike it from the record, but under the Highway Condemnation Act, and the rule applied by the Attorney General, such testimony is competent, and in that way the benefits are being considered, and the Court Commissioners will base their award upon the testimony introduced, and Appellant's award will be diminished thereby, although the word "benefit" may at no time be used or alluded to, by the witness or by the Attorney General. Regardless of what these benefits may be termed by the Attorney General, or the State Highway Commissioner, the expert testimony introduced by them, is based upon the consideration of such benefits, and we submit, therefore, that Appellant has been in that way denied the right of excluding such testimony, although it would have been excluded in proceedings under the Railway Condemnation Act, and could not have been considered by a jury making the award in such case.

The law is established beyond question in the State of Michigan, that under the Railway Condemnation Act, the tribunal assessing the damages, can not consider benefits arising to the remainder of residential property where a part of it is taken, by reason of the adaptability of such property for commercial or business purposes brought about by reason of the presence or proximity of the railroad.

No testimony tending to establish such a change in character of the property from residential use to industrial or business use, is competent evidence, and such testimony is always excluded.

In the case of *Plantanga versus Railway Company*, 190 Michigan, 661, the Supreme Court of Michigan carefully considered the charge of the court below to the jury, in applying the measure of damages provided for under the Railway Condemnation Act, which charge read as follows:

> "'the only question of fact,' the court told the jury, 'for you to consider, is whether the building and operation of this side track depreciated the value of the plaintiff's property for residence purposes'."

Again the jury was told:

> "'The question is, if that property had any value for residence purposes before the track was built, has that value been reduced by a proper operation of this side track in the usual way? * * * You are not authorized or permitted to take into consideration the use of the property for any other purposes except for rental purposes, rental *residence purposes*, and to what extent the building of the road depreciated the value of that property for those purposes; that is, you are not to take into consideration the value of the property for factory purposes'."

The Supreme Court affirmed the above charge of the of the court below, although the defendants strenuously insisted that the rule was too narrow, "since it prevented them from showing that the presence of the road in the street added materially to the actual selling value of the property *for purposes other than residence.*"

Although the above case was an action at law for damages, the Court stated that the rule of damages applicable to the Railway Condemnation Act, was properly applied. Of course there had formerly been no proceedings started to assess Plaintiff's damage in that case, which would bar an action at law for recovery, such as Appellant is confronted with in this case. That is, the condemnation of Appellant's land under the Highway Act will prevent any further recovery.

The attitude of the Appellee Railway Company and the Nelson Company, who are assisting the State in the Condemnation proceedings by authority of a provision in the contract contained in Section Ten of Act 340 of the Public Acts of 1927, is that benefits arising by the construction and operation of the railroad, are proper to be considered and deducted from the award. They say in answer to Appellant's Bill of Complaint (Paragraph Six):

> "* * * that the natural and reasonably to be expected development thereof will be for industrial purposes, and that the value of the remainder of the tract of land *after the construction and operation of a railroad* on the land taken in the condemnation proceedings, as hereinabove provided, *will be equal to, or in excess of the value of said remainder before the taking*" (Record, page 63).

A portion of paragraph seven of their Answer reads as follows:

> "7. Answering paragraph seven of the bill of complaint, these defendants neither admit nor deny the contents thereof, but leave plaintiff to his proof, except that they deny that the value of plaintiff's land will be diminished in the amount therein alleged, *or in any amount, but allege that the value will, in fact, be increased*" (Record, page 63).

The last part of paragraph ten of their Answer reads as follows:

> "These defendants further deny that it is material to the issues of this cause whether plaintiff would be otherwise entitled to be awarded other damages under the laws of the State of Michigan were his land being taken by a railroad company in the State of Michigan for railroad purposes" (Record, page 65).

We find the following statement on page 9 and 10 of the brief of Appellees Railway Company and Nelson Company filed herein:

> "* * * The evidence before the Court Commissioners to date is to the effect that the balance of his land *will not be depreciated in value, but will in fact be benefitted.*"

On page 44 of their brief, we find this statement:

> *"Whether benefits shall be offset or not is a matter of procedure and not a fundamental right."*

The attitude of the Appellee Railway Company in regard to deducting benefits from Appellant's damages, is clearly expressed on page 42 of the brief filed in its

behalf, by its counsel. We find there the following statement:

> "The most that can be argued for plaintiff is that it is not just or equitable to *offset benefits against the damages that would otherwise be payable as compensation for the taking of portions of his property,* but this is an argument to be addressed to the Legislature and not to the Courts, and the fact that the Legislature has seen fit in the railroad condemnation law not to authorize the offsetting of benefits does not mean that the plaintiff, or others similarly situated, has been, or will be, denied any fundamental right. *The railroad condemnation laws merely grant to property owners certain privileges which they are not constitutionally entitled to.* The highway condemnation law limits property owners more nearly to their constitutional rights, but it gives to *all* property owners all of the rights guaranteed by the constitution."

In view of the above language, and also in view of the fact that the railroad company is bound to repay the State all of the money expended in the acquisition of the new right of way, we should and must assume that the railway company will exhaust every effort in attempting to deduct benefits from Appellant's damages, which task it will undoubtedly accomplish under the Highway Condemnation Act.

On pages 56 and 57 of the brief of the above Appellees filed herein, we find the following statement:

> "The general highway condemnation law as applied to plaintiff's case does not deprive the plaintiff of any fundamental rights, privileges or immunities, but merely means that the plaintiff *will not be permitted to make as much of a monitary profit out of the proposed improvement as he would otherwise hope to get.*"

The language in the above quotations shows beyond a doubt, we believe, that the Appellee Railway Company intends to produce testimony before the Court Commissioners, to show that there will be benefits arising to appellant's property by reason of the construction and operation of the railroad. We also think that it shows very clearly that said appellees intend to urge the Commissioners to deduct benefits arising from the construction and operation of the railroad, from appellant's award. The statement of the Attorney General that *he* would not insist upon the deduction of benefits would in no way bind the action of the Railway Company in this case. In fact, testimony showing that in the future the Railway Company intends to operate fast interurban service between the cities of Detroit and Pontiac, has been placed before the Commissioners, to influence them in this regard, and they will evidently consider this to be a great benefit to appellant when fixing the award, although such benefit is speculative and impossible.

A portion of paragraph 8 (a), of the contract entered into between the State and the Railway Company, embodied in Section Ten of Act 340, of the Public Acts of 1927, reads as follows:

> "No purchases shall be made, except on the joint approval, in writing, of said State Highway Commissioner and Chief Engineer (of the Railway Company) and should either disapprove of the price of any proposed purchase, then the same shall not be concluded, but the land therein involved shall be acquired by condemnation. When condemnation is necessary, proceedings therefor shall be instituted and conducted on behalf of the State, by its proper officers, *but with the right in the railway company, through its attorney or attorneys, and other representatives, to participate in such proceedings.*"

By the above authority, the Railway Company has the right to enter into the proceedings and produce any testimony before the Court Commissioners which it deems necessary for the appraisal of appellant's property. The Attorney General in no way may limit or control the testimony which the Railway Company desires to introduce for the purpose of showing benefits, to be considered in offsetting appellant's damages by the Commissioners.

Nowhere in the brief of Appellee Railway Company has it stated, or even intimated, that it does not desire to deduct benefits from appellant's damages, or that benefits cannot be deducted under the present proceedings. It has formerly strenuously insisted that it has the right to require the Court Commissioners to deduct any benefits arising from the construction and operation of the railroad, from appellant's damages, and we believe that the Railway Company's brief, discloses that it takes the same attitude or position before this Court. The statements of Mr. Clardy, to the effect that the Highway Commissioner would not insist upon deducting benefits, could not and did not bind the railway company in any way, as the railway company appeared before this Court, represented by its own counsel, and not by the Attorney General or his assistant, Mr. Clardy.

The test in this case in determining as to whether or not Appellant is being denied the equal protection of the laws, is not dependent upon what the Attorney General and State Highway Commissioner *say* they will do in connection with the deduction of benefits, but on the contrary, the test is what they, together with the Railway Company, are doing, and what they have power to do in the future, proceeding under the Highway Condemnation Act. It has been held by a unani-

mous line of authorities that in considering the application of the Equality Clause of the Fourteenth Amendment, we are not to be governed by what a State Agency *might* do, but rather by what it *could* do, and what it is *attempting* and *threatening* to do, under an arbitrary power of discrimination, given by statute, so that certain persons will be denied the equal protection of the uniform laws.

Yick Wo vs. Hopkins, 118 U. S., 356.

We submit that the Appellees are now seeking to deduct benefits, from Appellants' award, and that they will so continue that policy in the future, and we further submit that the Highway Act allows such procedure and for that reason Appellant is now being denied, and that he will in the future be denied, the equal protection of the laws, contrary to the Fourteenth Amendment to the Federal Constitution.

BROWN VS. UNITED STATES, 263 U. S. 78, IS NOT IN POINT UPON ANY QUESTION RAISED IN THIS CAUSE.

The provisions of Act 340 of the laws of 1927 delegated to the State of Michigan through a State Agency, the power to condemn a right of way for the railway company, without taking from the Railway Company its right to also condemn a right of way.

Appellees contend that by virtue of the holding in the Brown case, the Highway Commissioner has power to condemn regardless of the fact that Appellant is deprived of his procedural rights, his fee simple title, and his right to damages that he would otherwise enjoy if the condemnation were being prosecuted under the Railway Act.

In the Brown Case the Court held THERE WAS NO OTHER AVAILABLE PRACTICAL MEANS by which a new site for three-quarters of the town could be attained adjacent to the one-quarter remaining and held the taking to be for public use.

No such situation confronted the State prior to the enactment of Act 340. The State Highway Commissioner could have condemned the railway right of way for highway use over the distance of five and one-half miles. The Railway Company, in turn, could have condemned a new right of way under the Railway Act. Both of these were *available practical means* for completing the project which the contracting parties could have utilized without question.

The only question raised by the land owner in the Brown Case was whether the respondents' property could be taken in that manner for public use. No objection to the procedure was raised on the ground that it offended the Equality Clause of the Fourteenth Amendment to our Constitution, and none was raised on the ground that the *procedure* was without due process of law. In fact, it could not be claimed that the Federal Act was offensive to the Equality Clause of our Fourteenth Amendment, because that amendment is limited to the inequality of State Laws.

APPELLANT IS LOSING THE ABSOLUTE FEE SIMPLE TITLE TO HIS PROPERTY, WHILE ONLY AN EASEMENT COULD BE ACQUIRED BY APPELLEES UNDER THE RAILWAY CONDEMNATION ACT.

The Highway Condemnation Act provides that the fee simple title to land may be taken, under the provisions of that Act. The Assistant Attorney General,

in his argument before this Court, admitted that the fee simple title is being taken from Appellant in this case. He also, in his argument, conceded that the fee simple title could not be acquired by condemnation under the Railway Condemnation Act. He further admitted that a railroad and not a highway, is now being constructed through and upon Appellant's land here involved.

Appellant, therefore, contends to this Court, that the taking of the fee simple title from him, by the State Highway Commissioner, for the purpose of immediately conveying said title to the railway company in fee, denies to the Appellant the equal protection of the laws and deprives him of his property without due process of the law, contrary to the Fourteenth Amendment to the Federal Constitution. In no other case in the State of Michigan has the property owner ever been compelled to surrender the fee simple title to his land, to be used for railway purposes.

Under the laws of the State of Michigan, it would be impossible to condemn the fee simple title to any other land to be devoted to railway uses. Appellant is forced by the proceedings under the Highway Condemnation Act to surrender a greater interest in his property than any other person could be compelled to surrender for railway use.

The fact that the State is taking a fee simple title from Appellant, by virtue of the Highway Condemnation Act, and deeding it, without restrictions, to the railway company, makes it possible for the railway company at any future date to impose any additional servitude outside of railway uses which it may see fit, upon the land taken from Appellant, and to put the land to

any use or to sell or lease it to any other person, for any other use or purpose, without any regard to the consequential damages which may be inflicted upon the remainder of Appellant's tract, and without any remedy on Appellant's part to prevent it from so doing. Such an injustice could not be accomplished if the land were taken under the Railway Act, and only an easement acquired.

In *Board of Health vs. Vanhosen,* 87 Mich. 533, at page 539 of the opinion, which is an early case, our Michigan Supreme Court adopted the rule that where an easement only was taken the railway company could not dispose of the same to private shippers. In so holding our Michigan Supreme Court spoke as follows:

> "It has been held that condemnation proceedings cannot be resorted to, to take lands for the construction of spur tracks which are made for the accommodation of individual shippers." In re *Railway Company,* 108 New York, 375. In re *Railroad Company,* 110 New York, 119; *Railroad Company vs. Wiltsz,* 116 Ill., 449; *Railroad Company vs. Iron Works,* 31 West Va., 710.

The foregoing rule has been consistenly followed in Michigan where only an easement was taken under the Michigan Railway Condemnation Act.

On the other hand, where the title in fee is taken, it is established beyond peradventure that the railroad may make whatever use it may desire of the land.

In Volume 2, Lewis on Eminent Domain, p. 1497, Sec. 58, the following appears:

> "But where a fee is taken for railroad purposes, the authorities hold that the company may dispose of the land as it sees fit, as against any private person."

The foregoing text is supported by a long line of authorities, among which are the following:

Curry vs. New York Transit Company, 66 N. J. Equity 313;

Eldridge vs. City of Binghampton, 120 N. Y. 309;

Calcasieu Lumber Company vs. Harris, 77 Tex. 88;

Anderson vs. Atlantic Coast Line, 59 S. C. 350;

Chamberlain vs. Northwestern Railroad Co., 41 S. C. 399;

Pittsburgh Railway Company vs. Garlick, 20 Ohio (C. C.) (Old) 561;

Spierling vs. Ohl, 232 Ill. 581;

Coin vs. Warriou Southern Railway, 137 Southern Ala. 553.

According to maps filed in the public records of the State Highway Department, a strip of land three hundred feet wide is being taken by the State through Appellant's property. A part of this strip, one hundred feet wide, is to be used in the building of tracks, and the remaining strip, two hundred feet wide, is to be ostensibly used in part by private shippers for sidings. After the fee to this property is taken, the railway company may, and in all probability will, sell a part of this land to private shippers for their sidings, if, and when, it has the opportunity to do so.

JOHNSTONE VS. RAILWAY, 245 MICH., 65, DISTINGUISHED

The holding of our Michigan Supreme Court in the Johnstone case is not controlling of any question involved in this case. None of the Plaintiff's lands were being actually taken by the State in that procedure. Johnstone's unsevered unit was approximately sixty feet away from the line of the proposed right of way, and was located in a highly restricted subdivision. The Court merely held that inasmuch as it was an equity case in which the Plaintiff prayed for an injunction to restrain the breaking of the restrictions, a procedure would be prescribed whereby damages to Johnstone's easement could be adjudicated and determined.

Because of the peculiar nature of the damages sought the Court merely laid down a different rule fixing the measure of the damages than that applied in both railway and highway condemnation.

The Court merely announced on page 83 the rule applicable to a railway taking, and the rule applicable to a highway taking. Both are in strict accordance with the established law of Michigan. Then the Court said: The Plaintiffs (meaning Johnstone and the Plaintiff in another case similar) were entitled to the application of another measure of damages entirely distinct from that involved in the case at bar.

It was not claimed in the Johnstone case that either the due process clause or the Equality Clause of the Fourteenth Amendment to the Constitution of the United States was being offended, and the Court did not pass upon those questions.

FITZSIMONS & GALVIN VS. ROGERS, 243 MICH., 645, DECIDED NONE OF THE QUESTIONS HERE RAISED.

In the Fitzsimons & Galvin case the Court held as follows:

> "But it does not follow from this that in a proceeding where the State Highway Commissioner is seeking to secure a right of way, the damages to be awarded the property owner will be anything short of 'just compensation' provided in Section 2 of Article 13 of the Constitution."

It will appear from the above that the only question raised by the Plaintiff in that case bearing upon probable damage award was "just conmpensation." It was not contended by the Plaintiff that Act 352 of the Public Acts of 1925, as amended, offended the Equality Clause of the Fourteenth Amendment to our Federal Constitution, and a review of the opinion discloses that the Court did not undertake at all to apply the equality test in determining the constitutionality of the Act.

The question of taking fee simple title from the owner instead of the ordinary railway right of way easement was not raised; neither was the question of jurisdiction of a Highway Tribunal to adjudicate damages for lands to be used as a railway right of way.

No question of consequential damages or deductions of benefits were raised.

Also the Court erroneously assumed that the State Highway Commissioner was proceeding under the State Agencies Act (one in every respect similar to our Railway Condemnation Act), instead of the Highway Act.

In the Fitzsimons & Galvin case the Plaintiff questioned only the Highway Commissioner's acts in making determination of necessity, no question of measure of damages being involved. The suit was brought after the date on which necessity was determined and before the Highway Commissioner filed the petition for the creation of a Highway Three Man Tribunal to determine compensation and pass title in fee.

Plaintiffs also upon hearing *waived the question of necessity,* therefore, none of the issues raised here in Appellant's case were raised in the Michigan Supreme Court in the Fitzsimons & Galvin case.

The comment of the Court to the effect that the damages awarded to the owner would not be less than "just compensation" is of no significance because that question is not involved in this suit.

"JUST COMPENSATION" IS NOT AN ISSUE IN THIS CASE

The term "just compensation" has no relation to the question of either arbitrary classification, or the question of equal protection of the laws.

Appellees, under this heading, vigorously contend that although Appellant may lose his right to a proper award of damages, and lose valuable procedural rights allowed to all other persons under similar circumstances, nevertheless, Appellant will be awarded "just compensation," and therefore he cannot complain. Both briefs of Appellees cite numerous authorities in support of this contention, all of which bear solely and alone upon the question of "just compensation." They have nothing bearing upon the question of arbitrary discrimination, applying to compensation of different parties in

similar circumstances. The term "just compensation" is flexible, and may be interpreted and applied by the State Court to produce any result desired in regard to damages. That provision in the State Constitution may be satisfied, although benefits be deducted in this case, while such benefits are not deducted in any other case where property is taken to be devoted to railway use.

Appellant complains here, that he is not getting *equal compensation,* or compensation equal to that which the law requires to be paid in all other cases where property is taken for railway use, because benefits are being deducted from his damages, while allowed to all other persons within the State under similar circumstances. In this way Appellant claims that the State is denying to him the equal protection of the laws contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

UNREASONABLE CLASSIFICATION

The general Railway Compensation Law automatically places all owners of real estate, destined to be taken for railway use, in a general class. This class is just as general in character as the railway law itself. All members of that class are entitled to remain in it, enjoying the equal protection which our Constitution guarantees.

This general Railway Law likewise places all railway companies in a general class, the outlines of which, are just as fixed and definite as those bounding the property owners' general class. The railways are jealous of their membership in this general class, and justly so. Often times their very existence depends upon it.

When some of the railroads of the general class are separated from it and placed in a special class by arbi-

trary legislation, they complain bitterly and seek relief from our Courts. The property owner of the general class does likewise when he finds himself similarly transposed. Each general class is afforded the same measure of protection against unreasonable classification by our Courts.

When a property owner, removed from the general class to a special class, by legislation, enjoys a higher degree of monetary reward in a railroad condemnation suit than those owners of the general class could enjoy when similarly situated, then the railroad is being discriminated against and has been placed arbitrarily in a discriminate class. The reverse of this is also true. What the property owner unjustly gains, the railroad must unjustly lose, and what the railroad unjustly gains, the owner must unjustly lose.

The Detroit, Grand Haven & Milwaukee Railway Company is seeking to enjoy advantages, immunities and privileges that no other railroad company could possibly enjoy in Michigan, because advantages, privileges and immunities are being denied Appellant and others, in his special class, that are denied to none of the general class of property owners similarly situated.

The privileges and immunities afforded the Appellee Railway Company in the contract, and Act 340, of 1927, could never be extended to any other railway in Michigan without other special legislative enactment of similar character. Likewise no other special class, similar to that in which Appellant has been placed, could be created without other special legislation. It necessarily follows that there can be no valid claim of a justifiable basis for this sort of classification.

RAILWAY COMPANY'S AUTHORITY TO CONDEMN APPELLANT'S LANDS

The authority of the Railway Company to initiate condemnation proceedings under the general Railway Act is in no way curtailed or abrogated by Act 340 of 1927, nor by the agreement contained in it. If this Court should hold the laws complained of unconstitutional, and restrain the prosecution of the proceedings now pending before the Highway Commissioners, the Railway Company would immediately institute a similar proceeding under the Railway Act. The Circuit Judge before whom the railway petition would be filed may order a jury struck forthwith and no obstacle would interfere with the early determination of the respective rights of the parties in a tribunal of competent jurisdiction. Appellant would then receive all rights, to which he is entitled, under the Railway Act, both as to procedure, and as to the measure of damages, and there could be no discrimination against him.

APPELLANT HAS NO ADEQUATE REMEDY AT LAW

Appellees, in their briefs, have dwelt at length upon the argument that Appellant has an adequate remedy at law, and, therefore, he has no standing before this Court. We can see no merit in this argument. In the first place, it would be impossible to review the award of the Court Commissioners until title would have been taken by the State and deeded in fee to the Railway Company. Thereafter the Railway Company could convey, mortgage, or appropriate the property as it saw fit. In case the Supreme Court, or more probably this Court, found the proceedings to take the property to

be unconstitutional, then Appellant would be required to institute a multiplicity of suits, and bring into Court all subsequent owners, in order to recover title to his property, which, if not impossible, would be extremely difficult.

In the case of *Johnstone vs. Railway Company*, 245 Mich., 65, our Court established beyond question, that the measure of damages allowed under the Highway Condemnation Act would be applied in this proceeding. The Court said:

> "The benefits arising by reason of the construction and operation of the railroad are proper to be considered * * *."

This is the rule applied under the Highway Condemnation Act. The rule under the Railway Act prohibits consideration of any benefits at all.

Meanwhile, Appellees have been, and are now, upon Appellant's property, digging and terracing the land for the purpose of constructing a railroad thereupon, and they are thereby causing great, immediate, continuing and irreparable injury to this Appellant's property. Appellant came into the Federal Court of Equity because he had no adequate remedy in a State Court of law. He desired to stop further injury to his land and to preserve his rights guaranteed by the Fourteenth Amendment to the Federal Constitution, which were being violated under color of State sanction.

It was settled for all time by this Court in the case of *Ex Parte Young*, 209 U. S., 123, that a person seeking relief, need not pursue his remedy in the State Courts while his Federal Constitutional rights are being infringed by operation of a State law, but on the contrary, he may institute proceedings in a Federal

Court of Equity immediately in order to restrain the operation of the statute. It was claimed in that case that the property owner was bound to pursue his remedy in the State Courts under the State laws, before he would have any right to come into a Federal Court of Equity. In answer to that contention, this Court spoke as follows:

> "If, however, he should do so, while the Company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the Company would have been taken during that time without due process of law, and there would be no possibility of its recovery" (p. 163).

The Court in the above case emphatically upheld its jurisdiction over the case presented. We think that rule should be applied in this case.

Appellant could not appeal from the determination of necessity, or the award of damages by statutory writ of certiorari as provided for in the Highway Act without recognizing the constitutionality of the Act. The only practical available procedure by which he could obtain a review of the constitutionality of the Act, and raise the due process and equality clauses of the Fourteenth Amendment to the Federal Constitution was by waiting until the Highway Commissioner initiated the portion of the proceedings that would result in the appointment of a Highway Tribunal that would undertake to award damages and take his title in fee.

Under the railroad law both necessity and compensation are determined by the jury in one proceeding, but under this new highway law a Commissioner was

authorized to determine necessity by himself in one distinct proceeding, and to have compensation determined before three Commissioners in another distinct proceeding.

Appellant could raise the constitutionality of both proceedings in the one action only by following the procedure employed in this suit.

Furthermore, this suit enables Appellant to test the Federal constitutionality by bill in Chancery in the Federal Court whereas an interlocutory injunction may not be obtained, pending a proceeding under the common law writ of certiorari.

Inasmuch as the State of Michigan is a sovereign State, and has never consented to be sued, Appellant cannot recover damages from it for the taking and destruction of his property, in case the statutes and proceedings applied are later found to be unconstitutional; and Appellant would have no way of recovering such damages from the Railway Company, because the property is being taken in the first instance by the State of Michigan, and the Railway Company has no contractural obligations or relations with Appellant.

We, therefore, submit that the Court below erred in dismissing Appellant's Bill of Complaint, and in denying Appellant's Motion for an Interlocutory Injunction.

Respectfully submitted,

FRANK H. DOHANY,
Appellant pro se.

Dated: Detroit, Michigan,
March 17th, 1930.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1929

No. 338

FRANK H. DOHANY,
Plaintiff and Appellant,

v.

FRANK F. ROGERS, et al,
Defendants and Appellees.

BRIEF OF DEFENDANT, FRANK F. ROGERS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1929

No. 338

FRANK H. DOHANY,
Plaintiff and Appellant,

vs.

FRANK F. ROGERS, State Highway Commissioner of the State of Michigan; THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, a Michigan Corporation, and THE H. W. NELSON COMPANY, of Chicago, Illinois, a foreign corporation,
Defendants and Appellees.

BRIEF FOR DEFENDANT FRANK F. ROGERS

STATEMENT OF FACTS

The statement of facts embodied in the appellant's brief is not complete nor entirely accurate. We therefore deem it advisable to present a statement of the facts.

This controversy arises out of the widening of a state trunk line highway by the Highway Department of the State of Michigan. The State emphasizes this important

fact because the appellant has predicated his entire argument upon a conclusion wholly at variance with this one controlling fact in the case. A clear understanding of the various statutes involved and of the legal position of both appellant and defendants can only be had, we believe, through a review of the history and background of this highway project.

Woodward Avenue, the state trunk line highway whose improvement by the State of Michigan has created the problems presented in this case, is perhaps the most important and heavily traveled highway leading out of the fast growing city of Detroit. This important artery starts at the river front which marks the southern boundary of Detroit, and goes diagonally in a general northerly direction through the heart of the city, and on through the counties to the north. The part of this highway which the State highway department is developing begins at the north city limits of Detroit and extends northerly for some nine and one-half miles through a densely populated area. The metropolitan area so served includes the city of Pontiac and a number of smaller residence communities. In this way Woodward Avenue carries a tremendous amount of traffic. Traffic counts demonstrate that this is one of the most heavily traveled highways in the whole United States.

More than ten years ago, the need for widening this highway was brought to the attention of the State. In 1921 the various communities most directly affected passed resolutions and began an active campaign to secure the greatly needed traffic relief. The problem was greatly complicated by the fact that the tracks and embankment of the co-defendant, the Detroit, Grand Haven and Milwaukee Railway Company, occupied sev-

eral miles of the land necessary for the widening of the highway. It was apparent that unless the State could acquire the railroad right of way immediately adjacent to Woodward Avenue the highway improvement could not be made in a satisfactory manner. In 1925, the Michigan State Legislature enacted a statute, which in the words of its title, was "An Act to authorize and empower the state highway commissioner to purchase or condemn property to exchange for the right of way, or a part thereof, of railroads, and railways, when such right of way, or part thereof, is necessary to be acquired for widening, straightening, altering or otherwise improving a trunk line highway, and to make such exchange." [Title to Act 215 Public Acts of Michigan 1925].

In the same year the Legislature enacted a highway condemnation statute which contained a section authorizing the State Highway Commissioner to acquire property to be exchanged for other property whenever such other property was actually needed for highway purposes, and an agreement had been made for the exchange. [Act 352 Public Acts of Michigan 1925]. Pursuant to the authority conferred upon the commissioner by these two acts, a contract was entered into with the railroad company whereby the state undertook to procure a new right of way which was to be exchanged for that part of the old right of way needed for the improvement of Woodward Avenue. In 1927 the Legislature enacted a statute which set forth in its entirety the sort of contract it desired the state to enter into with the railroad company for this exchange. [Act No. 340 of the Public Acts of Michigan 1927]. The contract theretofore entered into between the State and the railroad company was thereafter, in July, 1927, set aside and supplanted

by the new contract authorized by this last act of the Legislature. The general provisions of this act are substantially the same as those contained in the first contract.

The State thereafter proceeded to purchase lands needed for the new right of way to be exchanged for the old. Considerable progress was made in acquiring the property in this manner but it soon became apparent that in some instances it would be necessary to institute condemnation proceedings. (Incidentally it should be stated that at this time the State has succeeded in securing by purchase all of the lands necessary for this re-location project, except that owned by this appellant and his relatives and a few other small parcels. In other words, almost all of the nine and one-half miles have been secured without resort to condemnation).

In April, 1928, the State Highway Commissioner conducted a hearing strictly in accordance with the highway condemnation statute referred to above (Act 352 P. A. 1925), to determine the necessity for the project and for the taking of the particular lands involved. His determination of necessity was duly made and filed April 19, 1928, and the important parts thereof, so far as the appellant is concerned, are set forth in his bill of complaint. (R. p. 7) Certain others involved sued out a writ of certiorari in the State Supreme Court and the Commissioners' Determination of Necessity and the constitutionality of the act authorizing the contract between the railway and the state was attacked. The principle question involved in the instant case was most strenuously pressed in that case. It was there argued that the highway commissioner should not condemn the property under the provisions of the highway condemnation stat-

ute above referred to, but that he should use the condemnation statutes ordinarily employed by railroads. This case is entitled Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649. The opinion in that case will reveal that the contentions of the state were upheld in every particular, and the constitutionality of the statute and procedure was sustained. At the same time that case was before the State Supreme Court, the appellant herein also filed with the State Supreme Court a petition for a writ of certiorari. This was later withdrawn by the appellant.

After that decision by the State Supreme Court in the case above named, a great many cases were instituted in the circuit courts for the counties of Oakland and Wayne, involving new points. Two of them were consolidated and taken to the State Supreme Court. The opinion in those two cases is reported in the case of Johnstone, et al v. Detroit, Grand Haven & Milwaukee Railway Company, 245 Mich. 65. The problem there had to do with the right of lot owners in a restricted subdivision touched by the relocation project, but whose lots were not actually invaded, to recover damages for the violation of the restrictions. We mention this case because the pronouncements of our Supreme Court, both in the opinion and in the decree settled in that case, interpreted the state statutes involved in this case and because the purpose of the project was stressed.

About the time this last case was decided by the State Supreme Court, this appellant and two other plaintiffs initiated actions in the United States District Court, Eastern District of Michigan, Southern Division, in Equity. This defendant filed an answer and a motion to dismiss in each of the three cases and a hearing was duly

had before the statutory three-judge court. The construction on the entire project was held up by a restraining order during the time the cases were before the lower court. The dismissal of the bills of complaint and the lifting of a restraining order was ordered in the opinion written by Judge Tuttle, and concurred in by Judges Moinet and Hickenlooper.

Since the filing of the bill by the appellant, the defendant, Frank F. Rogers, has ceased to be State Highway Commissioner, having resigned on January 1, 1929. Another was appointed to fill the vacancy at that time and that man has now been duly elected for a full term. At the time the opinion was rendered by the lower court, therefore, the defendant, Frank F. Rogers, was not the State Highway Commissioner and did not represent the State of Michigan.

There has likewise been a change, in so far as the railroad is concerned, due to a consolidation which has been completed since the filing of the bill.

ARGUMENT

SUMMARY OF ARGUMENT

I.

THE STATUTORY TRIBUNAL BELOW HAD JURISDICTION TO DISMISS THE CAUSE AND THE DECREE HAS BEEN PROPERLY MADE AND ENTERED.

II.

EQUAL PROTECTION OF THE LAWS; ITS MEANING AND APPLICATION TO THIS CASE.

III.

THE MAIN ISSUE IS WHETHER THIS PROPERTY IS BEING TAKEN FOR RAILROAD PURPOSES OR FOR HIGHWAY PURPOSES.

A. *All of the claimed errors arise from the contention that this property is being acquired for railroad purposes and that the railroad condemnation statute is not being used. It is obvious that if the property is being taken for highway purposes the use of the highway statute is proper.*

IV.

THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION IS NOT BEING VIOLATED BY THE STATE'S ACQUIREMENT OF THE PLAINTIFF'S PROPERTY THROUGH THE USE OF OUR HIGHWAY CONDEMNATION STATUTES.

A. *The lower court's decision holding that plaintiff's property is being properly acquired for a highway purpose under the State Highway condemnation statute is in accord with the decisions of this court and state courts.*

1. Property acquired as substitute to be traded for that part of the present right of way of a railroad needed for the widening of a public highway is acquired for highway purposes as distinguished from railroad purposes.

Brown v. United States, 263 U. S. 78;
Pitznogle v. Western Maryland Railroad Co., 119 Md. 673, 87 Atl. 917;
Rogers v. Bradshaw, 20 Johnson (N. Y.) 735;
Fitzsimmons & Galvin Inc. v. Rogers, 243 Mich. 649.

2. Michigan Supreme Court has held this to be a taking for highway purposes.

3. Other courts have agreed with state's position.

4. Different highway uses will vary the elements and amount of damages but will not change the legal character of that use.

5. The state highway commissioner possesses authority to acquire lands to be traded to a railroad for a new right of way where part of the old line is needed for the widening of a public highway.

Sec. 23—Michigan State Statute, Act 352 Public Acts 1925 (Set forth fully in appendix)
Sec. 1—Michigan State Statute, Act 215 P. A. 1925.
Fitzsimmons & Galvin Inc. v. Rogers, 243 Mich. 649;
Johnstone, et al v. D. G. H. & M., 245 Mich. 65.

B. *The Michigan State Supreme Court has held that this property should be acquired under the provisions of the highway condemnation statute.*

Fitzsimmons & Galvin Inc. v. Rogers, 243 Mich. 649; Johnstone, et al v. D. G. H. & M. Ry. Co., 245 Mich. 65.

C. *The Michigan State Supreme Court has held that the State has observed all the statutory requirements and that due process of law has been accorded appellants.*

Fitzsimmons & Galvin Inc. v. Rogers, 243 Mich. 649; Johnstone, et al v. D. G. H. & M. Ry. Co., 245 Mich. 65.

D. *Interpretation of our state statutes by our Supreme Court is binding upon Federal Courts.*

1. The construction and constitutionality of state statutes by a State Supreme Court will govern the Federal Courts.

27 R. C. L. 44, 46;
West v. Louisiana, 194 U. S. 258, 48 L. ed. 965; 6 R. C. L. 85, 87;
Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112; 41 L. ed. 369;
General American Tank Car Corp. v. Day, 270 U. S. 367, 70 L. ed. 635;
Ashe v. United States, 270 U. S. 424, 70 L. ed. 662;
Palmer v. Ohio, 248 U. S. 32, 63 L. ed. 108.

E. *Regardless of whether the property is being acquired for highway purposes or for railroad uses, a proper classification has been adopted and the use of the highway statutes in acquiring the property is justified.*

1. The Legislature has a wide range of discretion in establishing classifications.

6 R. C. L. 384.

2. A classification in eminent domain cases is based on the character of the agency seeking to take the property.

" • • • The classification (is) based on the character of the party seeking condemnation. • • ".

20 C. J. 874.

In re Valley Center Drain Dist. 64 Mont. 545, 211 Pac. 218;
Marin Municipal Water Dist. v. Marin Water & Power Co., 178 Cal. 308, 173 Pac. 469;
Munn v. Independent School Dist., 188 Ia. 757, 176 N. W. 811.
Jeffrey Manufacturing Co. v. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. ed. 364;
Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050.

F. *The provisions of the highway condemnation statute and railway condemnation statute have been found by our State Supreme Court to be substantially identical.*

Fitzsimmons & Galvin Inc. v. Rogers, 243 Mich. 649;
Johnstone, et al v. D. G. H. & M. Ry. Co., 245 Mich. 65.

V.

THE PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW.

ARGUMENT

I.

THE STATUTORY TRIBUNAL BELOW HAD JURISDICTION TO DISMISS THE CAUSE AND THE DECREE HAS BEEN PROPERLY MADE AND ENTERED.

The appellant's objections that the three-judge court lacked jurisdiction to dismiss the bills and that the single judge did not possess authority to enter a decree seem to us to be conflicting and also to operate to defeat the appellant's right to appear before this court. The point was discussed by counsel and a hearing was held before District Judge Tuttle after the court had entered the decree appealed from, and counsel for the defendants were at that time convinced that the court had acted regularly and properly under the statute. When the cause came on before the lower court the court inquired as to whether or not it was desirable to consider the motion to dismiss at that time. The plaintiff suggested to the court that the motion to dismiss should be considered along with the request for an interlocutory injunction. He said at one point,—

> "I presume counsel for the defendants have the opening, your honor, on their motion to dismiss the bills and on their order to show cause too, I believe."

At the conclusion of the discussion, as to what should be done, the court used the following language,—

> "You may proceed upon the motion to dismiss."

Regardless of whether the three-judge tribunal has the power and authority to consider a motion to dismiss, it is surely true that either that tribunal or the district judge possesses that power. One or the other does possess the authority and the motion to dismiss, being properly noticed for hearing on that date, it was entirely permissible to have it considered at the same time the appellant's motion or order to show cause for an interlocutory injunction was being considered. The Federal Court in the case of Republic Acceptance Corporation v. De Land (C. D. Mich. 1921) 275 F. 632, has held that while the district court was powerless to grant an interlocutory injunction without the aid of the two other federal judges required by the statute, it nevertheless did have the power to dispose of a motion to dismiss the bill. The same court has likewise held in a case where a memorandum opinion by three judges under the section now being considered had been filed, that it was proper for the local district judge acting alone to approve a bond and to issue the injunction authorized by the opinion.

Monroe Gas, Light, etc. Co. v. Michigan Public Utilities Comm., (D. C. Mich. 1923) 292 F. 139.

It has likewise been held that where the three judges have properly held the hearing, they may delegate to the local judge the power of issuing the injunction.

Ill. Central R. Co. v. Ky. R. Co., (D. C. Ky. 1924) 1 F. (2d) 805.

The record plainly indicates that all three of the judges have concurred in writing in the decision that the interlocutory injunction should not be granted. They have likewise concurred in the decision that the bill should be

dismissed. There is no requirement in the statute which would compel the three judges to formally meet together in making their decision. They need not appear in open court and hand down the decision in that fashion. It would seem to be entirely permissible for them to agree in writing and to cause their agreement or opinion to be filed. That has been done in this case. It seems certain that the opinions filed do confer authority upon Judge Tuttle to enter the formal decree denying the interlocutory injunction and dismissing the bill. If the order was deemed insufficient and improper by the appellant, he should have mandamused the court to make and file the proper order. This court has so held in the case of Ex parte Metropolitan Water Co. of West Virginia (Kan. 1911) 31 S. Ct. 600, 602; 220 U. S. 539; 55 L. ed. 575. If the appellant's second objection is correct and if the single judge had no authority to enter a decree, then this court is without jurisdiction in the cause. A proper order has not been appealed from, and in fact there is nothing upon which an appeal can be predicated because, as the court has pointed out, this section of the Code "makes no provision for any appeal from an order of this character made by a single judge and a right of appeal is not otherwise given by statute". It is the State's position, however, that either the single judge does possess authority to entertain and decide a motion to dismiss or that the three-judge tribunal may do so, and that regardless of which may be correct, the decree entered is sufficient. There can be no dispute about the fact that if the district judge alone possesses the power, then having heard the motion brought on in a proper manner and at the proper time, Judge Tuttle was in a position to order the dismissal. If the three-judge tribunal which heard the matter possesses the power to dismiss, then the written opinions filed by the court cer-

tainly conferred authority upon Judge Tuttle to act for the entire court. So far as the interlocutory injunction is concerned, the record clearly demonstrates that the court ruled against the appellant on the order to show cause. The court did not grant the interlocutory injunction prayed for. The order entered by Judge Tuttle was done in conformity with the authority conferred upon him by the opinions filed by the judges. Of course, if the court should find that this order should have been signed by all of the members of the court, then the case cited above with regard to the necessity of mandamusing the court to make the proper order applies and the appeal is not properly brought.

Either a single judge or the special tribunal had power to entertain a motion to dismiss. Since the motion was heard simultaneously with the appellant's order to show cause for an interlocutory injunction, either the single judge or the special tribunal could have dismissed the case after the hearing. An order dismissing the cause naturally disposes of the entire matter and certainly precludes the possibility of an interlocutory injunction being granted.

II.

EQUAL PROTECTION OF THE LAWS; ITS MEANING AND APPLICATION TO THIS CASE.

Since appellant's entire case is builded on a claim of denial of the equal protection of the laws, we should first direct our inquiries toward the meaning of this clause of the Constitution. Obviously, we cannot consider all of the lights and shades of meaning that phrase may connote, but we may make some general observations, having in mind the situation which the facts in the present case disclose.

A precise definition of this phrase cannot be given. However, we find rather general agreement on the proposition that,—

> " • • it has been said that the equal protection of the laws is a pledge of the protection of equal laws, and that it means equality of opportunity to all in like circumstances."

6 R. C. L. 370.

The appellant would stretch that statement to make it mean that he is entitled to have not only similar and equal laws applied, but the same identical statute used in all other eminent domain cases when his property is being taken for the same purpose. The appellant in his brief has devoted himself almost entirely to a discussion of the differences he claims to find between the statute being employed and the one he contends should be applied. He has made the flat statement that he is entitled to have the particular statute he desires used and cites the differences between the two statutes as a reason. Although he has not made any attempt to divide his argument into the two logical divisions we believe they will fall into, his statements suggest the two following lines of reasoning:

1. That this (he says) is a railroad condemnation proceeding and, therefore, the general railroad statute he names is the only one that can be used.
2. That, granting this to be a railroad condemnation case, if any classification is proper and permissible, the facts in this case do not warrant or justify the classification adopted.

We are unable to discover whether he is presenting

the first argument or relying chiefly upon the second one. Of course, as we shall point out later on in this brief, the first ground is untenable because undoubtedly a State may classify persons or subjects and is not required to grant the use of the same statute to all the classes established.

> "State legislation does not constitute a denial of the equal protection of the laws so long as all persons subject to it are treated alike under similar circumstances and conditions in respect both to the privileges conferred and to the liabilities imposed, * * * ."

12 C. J. 1145.

The appellant carries the burden of establishing that this is legally a taking for railroad purposes and must then show that the legislature had no reasonable ground upon which to make a classification, or he will not have established a denial of the equal protection of the laws through the employment of the highway condemnation statute. Even if he should establish that this is a taking for railroad purposes (which we deny), the State legislature is certainly entitled to make a classification and to direct the employment of different statutes for different railroad purposes if the facts warrant. *Appellant cannot establish a denial of the equal protection of the laws by simply comparing the terms of one statute with another, even though both were enacted for the acquirement of property for the same general purpose if the classification the legislature has made is proper. The showing of a difference between two eminent domain statutes is of importance only after the unreasonableness of and lack of justification for the classification has been established.* A showing that the terms of one statute available for

use by a certain class differ from those of another statute used by another legislatively established class does not prove that the classification is erroneous. Such argument does not show a lack of justification or reason for the classification adopted. It need be considered only after other proof has demonstrated the lack of reason for the classification. The equal protection clause only contemplates that persons within a given class shall all be treated alike, *not that all persons shall be so treated.* Appellant has not made any showing that he is being treated any differently from all the others in his class. There is nothing in the record to warrant such a conclusion. The decisions of our own Supreme Court, to which we shall refer at length later on, demonstrate that he is being treated exactly the same as all others in the same situation. He must, therefore, show that the classification adopted in this case (if we are to speak of it in those terms at all) is unwarranted by the facts. This cannot be shown by simply saying that the terms of the statute we are using are different from those of another act which he thinks should be used. *As we view it, the equal protection clause would not prevent the establishment of a classification and the enactment of two or more statutes to be used by that class, provided that the several statutes were "equal" although not absolutely identical.* If two statutes were to be made applicable to the same class, then it would be proper to show the differences between those statutes for the purpose of demonstrating that they were not "equal" and thereby establish a denial of the equal protection of the laws.

The appellant has placed great reliance upon the case of Truax v. Corrigan, 257 U. S. 312. In that case a certain group of persons were singled out and completely

denied injunctive relief in a certain class of cases. There is no complete denial of a remedial right in the present case. Truax v. Corrigan was not a case where a special group of people were given injunctive relief by a statute which, while allowing this group to secure the desired injunction, prescribed a special form of procedure to be followed by them in securing it. Had it been of that type, there might be some comparison made between that case and the present one. In our case the appellant compares the statute the State is using with another statute he desires used and says that he is being denied the equal protection of the laws because the procedural path of one differs from the other. Our State Supreme Court has held that due process is being observed through the use of the statute we are employing, and that it will accord him just compensation. In Truax v. Corrigan there was no other statute granting injunctive relief. The plaintiff in that case raised the issue of a denial of the equal protection of the laws because of the complete denial of any such remedy.

This court in Truax v. Corrigan has said in substance that the denial of this procedural right to a certain group without any good reason for that denial is a violation of the equal protection clause. That case is not authority for the proposition that this clause is violated through the establishment of a classification which prescribes a statutory procedure which complies with due process and which the State Supreme Court has ruled is the equivalent of the statute which the appellant contends should be used.

If a reasonable classification is established there need not be a similarity in the statutes employed by the different classes. If the case should be viewed in the light

most favorable to the appellant's contentions and this should be adjudged a taking for railroad purposes, there is yet available the consideration that the classification is proper, and in addition it may appear that the two statutes are substantially identical and that they accord the appellant the same protection. On the other hand, if this is a taking for highway purposes, all questions as to classification are without force and are not applicable, because certainly the equal protection clause cannot be said to be violated when the regular highway condemnation statute is used.

III.

THE ISSUE

THE MAIN ISSUE IS WHETHER THIS PROPERTY IS BEING TAKEN FOR RAILROAD PURPOSES OR FOR HIGHWAY PURPOSES.

A. *All of the claimed errors arise from the contention that this property is being acquired for railroad purposes and that the railroad condemnation statute is not being used. It is obvious that if the property is being taken for highway purposes the use of the highway statute is proper.*

The appellant has set forth some forty-three claimed errors on the part of the lower court. There is one common basis for each and every alleged error. This foundation is the failure of the court to determine that the appellant's property is being taken for *railroad* purposes and its affirmative finding that the property is in

fact being taken for *highway* uses. *The state is taking this property for highway purposes, and in so doing, is using the regular and usual condemnation statute employed for that purpose.* Appellant contends that the property is being taken for railroad purposes and that therefore the railroad condemnation statute should be employed. It is obvious that if the lower court's finding that this property is being taken for *highway* purposes is correct, then all claims of error because of failure to use the railroad statutes must fail.

The appellant has made many claims to the effect that Act 215 of the Public Acts of 1925 is void and that the court erred in failing to so find. This act is the statute which specifically authorizes the State Highway Commissioner to acquire land to be traded to a railroad for that part of its right of way needed for the improvement of a public highway. *If the acquirement of land for the purpose of trading it to the railroad where the state has found it necessary to take part of the railroad right of way for a highway is a taking for highway purposes, then of course the use of the statute complained of does not constitute a violation of the Fourteenth Amendment.* Another allegation of error (9) raises the same point with regard to Act 340 of the Public Acts of 1927. This act is the contract in its entirety entered into between the railroad and the state under the authority conferred upon the State Highway Commissioner, by Act 215 P. A. 1925, referred to in error Number Eight.

In Error Number Ten the same claim is raised with regard to Act 352 P. A. 1925. This is the highway condemnation statute under which we have been proceeding. The rest of the allegations repeat in one form or another and in more detail the same objections that have

been set forth in the paragraphs mentioned. It will be seen that in every instance the appellant's claims of error must fail if the court is correct in its finding that the property is being taken for highway uses.

Our analysis of the arguments advanced by the appellant in his brief will disclose that if the property is being acquired for *highway* purposes as distinguished from *railroad* purposes, his case must fail, because the proper statute is being used. Appellant is not entitled to have the railroad condemnation statute used for the acquirement of property for highway purposes. When appellant argues that the highway condemnation statute deprives him of certain procedural rights he is assuming that he is having his property taken for railroad purposes and is entitled, therefore, to have a certain railroad condemnation statute applied. The same is true with regard to his claim that he is being deprived of certain substantive rights.

On page 22 of his brief, he makes the statement—"It is admitted that the State is not condemning the property for highway purposes." This statement is absolutely without foundation, and we challenge counsel to show where and when such an admission has ever been made by any of the defendants. In fact the very opposite have always been the true position. It has been the State's position from the outset that this property is being acquired for *highway* purposes and that application of the *highway* condemnation statute is not only proper, but required by the statutes involved.

The other arguments appellant advances must likewise fail if the State's contention is upheld that this is a taking for *highway* purposes. The question of classifi-

cation can only enter into the problem in the event it be proved that this is a taking for railroad purposes. Likewise, appellant's contention that the Highway Commissioner can select any one of several statutes is without force if this be a highway project, because he would be compelled to use the highway condemnation statute he is now employing if it is a taking for highway purposes. The same is true with regard to his argument that the property is not being taken for any public purpose. The argument, wherein he says that there is no necessity to take his property, stands on the same footing with the rest.

IV.

THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION IS NOT BEING VIOLATED BY THE STATE'S ACQUIREMENT OF THE PLAINTIFF'S PROPERTY THROUGH THE USE OF OUR HIGHWAY CONDEMNATION STATUTES.

A. *The lower court's decision holding that plaintiff's property is being properly acquired for a highway purpose under the State Highway condemnation statute is in accord with the decisions of this court and state courts.*

1. *Property acquired as substitute to be traded for that part of the present right of way of a railroad needed for the widening of a public highway is acquired for highway purposes as distinguished from railroad purposes.*

The sole impelling motive in this whole project has been the necessity of widening Woodward Avenue. The railroad absolutely prevents expansion as it exists alongside the present inadequate highway. Its removal must be effected before the widening project can be carried on. The removal of the tracks is an incident to and is necessitated by the highway improvement project. It has been the State's position that it had doubts as to whether it possessed the power to condemn this section of the railroad right of way. At least the difficulties attendant upon a successful acquirement in that manner were so great as to induce the Legislature to enact several statutes all designed to make possible the widening of the highway in a manner best adapted to the circumstances.

The State Legislature, recognizing that the state could not or at least should not condemn a few miles out of the heart of a great railroad and thereby suspend its operations until it could succeed in finding other property which it might not be able to acquire, resolved that the best way of solving the difficulty was to acquire a strip of land for a new right of way in its own name and then trade that strip to the railroad for that part of its right of way needed for the highway. The legislature determined that it was necessary to acquire property for this purpose which thus became a taking for a highway purpose. The State Highway Commissioner therefore employed the statute ordinarily used by him in all highway projects. Our Supreme Court, in considering the cases which have been presented to it by other property owners whose property was being taken for this project, has held that the property is being taken for highway purposes and has relied upon a decision of this court in support of its position.

"3. The plaintiff also urges that the requirements of the State for constructing this highway would have been satisfied by the mere condemnation of the present right of way of the railroad company; and since the railroad has the power to condemn land, there exists no necessity for the procurement by the State of another right of way for the railroad. In taking this position, the plaintiff overlooks the fact that the need of acquiring plaintiff's land for a new railroad right of way arose incident to and as a necessary part of the construction of a State highway, and that it is therefore within the right and power of the State under the legislative enactment, (Act No. 340, Pub. Acts 1927) to relocate the railroad."

Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649.

This court has had occasion to pass upon the principal question involved in this case. Its decision in the case of Brown v. the United States, 263 U. S. 78, is controlling, and is authority for the State's position that this is a taking for highway purposes as distinguished from railroad purposes. In the Brown case the United States was condemning property for the purpose of exchanging it for other property. The property for which it was traded was to be actually devoted to the construction of an irrigation project. The property needed for the irrigation project was part of a town. Instead of condemning this town property, the United States condemned Brown's property and traded it to the persons owning property in the town. The contention was made in that case that the property upon which the new town site was to be laid out and later exchanged for the old, was not being taken for the irrigation project, but, in point of fact, for nothing more than a town site. The

further argument was then made that "the United States is without power to condemn land for the purposes of a town site under the circumstances set out in the record". The very heart of the case was founded on that major proposition. It was also contended that "under the most liberal definitions, the taking proposed could not be construed to be for a public use", *because the use to be made of the property after the exchange was the determining factor and such use was to be private.* Mr. Chief Justice Taft, in his opinion at p. 80 in the Report, tells us that this was the point involved when he said,—

> "The plaintiffs denied the power of the Congress under the Federal Constitution to condemn the land because not taken for a public use. * * The plaintiffs contend that the power of eminent domain does not extend to the taking of one man's property to sell it to another, that such an object cannot be regarded as for a public use of the property, and, without this appropriation can have no constitutional validity."

The condemnation proceeding in that case went forward under provisions of Chapter 270 of the Idaho Com. Statutes, 1919. An inspection of the Idaho statutes will reveal that they merely confer power to take for the usual public purposes, including irrigation projects. There is no authority conferred upon anyone to take property for the purpose of laying out a town site, nor is there any authority to be found for the taking of property upon which private dwellings, apartment houses and the myriad other businesses to be found within the limits of any modern city, would be placed. *The sole justification for the taking of Brown's property is to be found in the holding of the court that it was being taken directly for the irrigation project.* That was the only public purpose which could justify the exercise of the power of eminent

domain. The land taken was to be *actually physically* devoted to hundreds of different *private* uses after the government had acquired it and traded it to those owning property in the old town site. The argument presented by the plaintiffs in that case is identical with that presented by the appellant in our case. They argued that the platting of a town site and the devotion of the various fractional parts of that property to the private use of a large number of private individuals and companies after the exchange was not a taking for a *public use*, but for the private use of those to whom the property would be transferred after its acquisition. It was contended that the nature of the use to which the property was put by those to whom it was traded determined the legal nature of the taking by the government. In our case the appellant contends that the legal purpose of the taking is to be determined by the character of the individual to whom the property is traded after it has been acquired and by the use that individual makes of the property. *If this argument is valid, then in the Brown case the use for which the property was taken would have been for that of a butcher shop, a private dwelling, a factory, an office building, public streets, electrical railroads, steam railroads and a myriad of others.* Most of the uses to which the land would ultimately be devoted by those to whom it was traded would have been strictly private and could in no sense be considered public uses. The problem, as it presented itself to Mr. Chief Justice Taft, was, therefore, more difficult than that presented in our own case, because it is possible for us to say that the properties' devotion to the construction of a railroad after its transfer is nowadays considered as much a public use as that of highways. There can be no valid argument made that the property is to be used for a private purpose. This favorable circumstance, however, does not alter the fact

that the Brown case is authority for *the proposition that the taking of property to be traded to another whose land will be actually and physically devoted to a certain public purpose is as much a taking for that particular public purpose to which the land physically used is devoted, as the land actually physically used.* The land to be traded to the owners of property in the old town site and the property for which it was traded was taken for identically the same public purposes. *If that proposition were not true in all respects, there could have been no taking. There was no other public use the court could name because there was none involved.* That was precisely the contention presented to the court in that case and squarely passed upon by Mr. Chief Justice Taft. We find him saying—

"The district court held that the acquisition of the town site was so closely connected with the acquisition of the district to be flooded, and so necessary to the carrying out of the project, that the public use of the reservoir covered the taking of the town site. We concur in this view.

* * *

"*No one would say that a legislative act authorizing a railway company to build a railroad exceeds the constitutional limit by reason of a specific provision that the company may condemn land not only for the right of way, but also additional land adjacent thereto for use as borrow pits in making fills and embankments, or for use as spoil banks or dumps for the earth excavated from tunnels and cuts. Such adjacent land would certainly be devoted to the public use for which the railway was being constructed. If so, then the purchase of a town site on which to put the people and buildings of a town that have been ousted to make the bed of a reservoir would*

seem to be equally within the constitutional warrant. THE PURCHASE OF A SITE TO WHICH THE BUILDINGS OF THE TOWN CAN BE MOVED AND SALVAGED, AND THE DISPOSSESSED OWNERS BE GIVEN LOTS IN EXCHANGE FOR THEIR OLD ONES, IS A REASONABLE ADAPTATION OF PROPER MEANS TOWARD THE END OF THE PUBLIC USE TO WHICH THE RESERVOIR IS TO BE DEVOTED."

The Chief Justice made a point of the fact that the use of land for the actual laying of rails was not the only railroad purpose for which land might be taken. He pointed out that land might be taken for borrow pits or for spoil banks, and remarks that either of the latter uses would be *railroad uses,* and then says that, by analogy, the use of property, upon which to place buildings which must be removed from their location because their present site is to be used for a public purpose, is just as much a devotion to the same public purpose as the property from which the buildings were moved. He realized the force of plaintiffs' contention that the actual physical uses to be made of the property taken after the exchange was made would be largely private in nature. *He saw that if the ultimate physical use to which the property was to be devoted should govern, the taking would not be for any proper public purpose and could not, therefore, be sustained.* By the application of plain common sense, the trial court had ruled that the property was being taken for the irrigation project. Mr. Chief Justice Taft succinctly said—"We concur in this view".

In our case the highway condemnation statutes which have been applied, authorize the taking of property for a large number of uses, all of which are determined to be

highway uses. Property may be taken for the actual placement of the road itself; for the excavation of gravel, rock, sand, dirt or other materials that may be needed for the construction or maintenance of the road; *property needed to change the channel of a watercourse,* and various other uses. In addition to all those ultimate uses of land which have all been declared to be highway uses, our legislature, in the valid exercise of its power, has determined that land taken for the purpose of exchanging it for that part of railroad rights of way which are needed for the construction of a public highway is taken for highway use and supplements the highway uses enumerated in the highway condemnation statutes. *This is comparable to a taking for the purpose of diverting a stream. It permits the diverting of the course of a railroad instead of a stream.* The actual physical uses of the property in all those instances set forth in the highway condemnation statutes are all proper highway uses. The mere fact that instead of placing concrete on some of the property taken, a stream is to be diverted across it or a gravel pit dug thereon, does not change the *legal* nature of the use from that of highway use to those actual physical uses to which the land is devoted. In other words, when the Highway Department takes a tract of land and excavates gravel, the use is not for gravel purposes but for *highway* purposes. When land is taken for the diversion of a railroad or to be exchanged, the use is not the digging of gravel or the placement of a railroad thereon, or any other ultimate physical use, but a highway use.

There is one difference between the situation in the Brown case and the State's position in this case. In the Brown case, the Idaho statute under which they were condemning did not specifically incorporate a provision

which authorized the taking of the land for the purpose of the exchange. In our case, we have a specific legislative declaration on the subject authorizing the State to take lands for that identical purpose and declaring it to be a highway purpose. It is true that the act of Congress authorizing the construction of the irrigation project did confer authority upon the Federal Government "to purchase or condemn and to improve suitable land for a new town site to replace the portion of the town of American Falls which will be flooded by the reservoir • • ." The Federal Government was, therefore, using the Idaho condemnation statutes having to do with the taking of property for all public purposes and which contained no specific reference to property to be taken for exchange purposes. *It was therefore necessary for the court to hold that the taking of the land for the exchange was for one of the public purposes named in the statute if the Idaho statutes were to be used.* In our case, the statutes are all part of the general authority conferred upon the Highway Department to exercise the power of eminent domain and the taking of property for exchange purposes is specifically called a highway use.

The appellant in our case argues that since a railroad will ultimately be placed on the property, we must use the railroad condemnation statutes. Such an argument applied to the Brown case would have resulted in the use of as many different condemnation statutes as there were different uses to be made of the property after it was traded. *The Idaho statute ordinarily used for irrigation purposes could not have been used for any of the property taken.* If it was proposed to take any of the property for the purpose of being traded to someone for use as a private dwelling it could not have been taken under any statute. It is elemental that Congress cannot

enact a statute authorizing a taking for private purposes any more than a state legislature. Therefore, unless the taking could be called a taking for some public purpose, there could be no authority of any sort. The court could not say that the public purpose was for the erection of private dwellings and stores (the actual physical use in that case, just as the construction of a railroad is to be the actual physical use in our case) because such uses are not public uses. If the appellant in our case is right in his argument, Mr. Chief Justice Taft should have held that as to those parcels which were to be traded to persons for private use, there could be no taking and that as to those parcels which were to be devoted to public purposes, the government must name all of these uses and then apply a different statute to each such use. The most substantial argument advanced was that the Congress did not have any power to condemn because it was being taken to be sold for uses other than public ones. The court unhesitatingly brushed even that argument aside and squarely held that the taking was for a *public purpose* and *"that the public use of the reservoir covered the taking of the town site."* And the use of the one statute for taking all the property was approved. There was only one possible public use for which the property could be said to have been taken—the irrigation project—and, therefore, that was named. We believe that this decision is controlling and that it establishes a principle that definitely answers and refutes all the theories the appellant in our case has advanced.

On the oral argument below the appellant advanced the theory that all the Brown case determined was that the taking was for *some* public purpose. They then reasoned that since the actual physical use in our case was to be for railroad purposes (which we do not concede)

the purpose was public in nature and that the decision in the Brown case meant nothing. They are not correct. *What the court did determine was that the final use made of the property after it was traded had nothing to do with determining whether the taking was for a public or a private use.* The final and actual physical use of the property in that case was certainly not public in nature, in and of itself. The land was devoted to private uses almost exclusively. Mr. Chief Justice Taft, therefore, was compelled to disregard the ultimate physical use of the property in determining the legal nature or character of the taking.

In the assignment of error in the Brown case, it was set up that the district court had erred in holding that the United States had authority under the acts it was using *"to exercise the right of eminent domain and condemn the priva. lands of these plaintiffs in error for town site purposes."* The district court in its decision, however, had said:

> "Upon the other hand it must be conceded that generally the Government is without the power to engage in the promotion of town sites, *and unless the enterprise here bears a substantial relation to the irrigation project, it cannot be held to be of such a public character as to warrant the exappropriation of private property.* • • • The town site may or may not be profitable; the promotion of such enterprises is necessarily a speculative and hazardous business. *But assuming that it will be profitable, an enterprise by which private property is taken for essentially private uses is not rendered public by the fact that the incident profit is to be applied to public purposes.* Were the proposed use of an expected profit the criterion, the right of the government to take private property would be unlimited. It might condemn not only the requisite site for a post office, but likewise an indefinite amount of other property merely to be

sold back into private ownership, at a profit out of which to pay for the site. However, the case here presents other considerations."

Mr. Chief Justice Taft, therefore, certainly had before him the precise question involved in our own case. The plaintiffs there were vigorously asserting that the actual and ultimate physical use to which the property was to be put after the government had acquired it and traded it was controlling in determining whether the use for which the land was taken was a public use or a private use. The district court recognized that fact and, as we have shown above, passed squarely on the point *and made it clear that the actual uses made of the property after the taking and the exchange had nothing to do with determining the legal character and nature of the purpose for which the property was taken.* The Supreme Court of the United States upheld that view. This reasoning, applied to our case, means that the fact that the land is to be traded to a railroad and devoted to railroad uses after that exchange, is not to be considered by the court in any way in deciding the first and most important question in this case—the exact nature and character of the purpose for which the land is taken. It matters not whether we pay close regard to what the court reasoned in the Brown case when it said "unless the enterprise here bears a substantial relation to the irrigation project, it cannot be held to be of such a public character as to warrant the exappropriation of private property." *It is at least certain that the court did not say that the taking was for a public purpose because the uses to which it was to be put after the exchange which were private in nature governed.* We are unable to see how the argument of counsel and the statements of the courts in that case can be interpreted to mean anything other

than that *the taking was for a public purpose because it was a taking for the irrigation project. In our case the taking is, therefore, a taking for a public purpose because it is a taking for highway use.*

Since the courts in the Brown case could not determine that the taking was for a public purpose by reason of the fact that the ultimate physical uses were to be public (because they were actually private), they must either have had to say that it was a taking for the irrigation project *or to declare that taking property for the purpose of making an "exchange" was a new and independent public purpose.* It matters not which one of these we apply to our own case. If the taking is to be declared for a public purpose because taking it for "exchange purposes" is a new and special public purpose, then it most certainly is not a taking for railroad purposes and there exists no good and valid reason why a special mode of procedure may not be prescribed for that new and special public purpose.

2. *Michigan Supreme Court has held this to be a taking for highway purposes.*

The Michigan Supreme Court has had before it upon two occasions the claim that this property was being acquired for "railroad purposes". Upon each occasion the court has emphatically said that the property was being acquired under the proper statute for "highway purposes".

In the first case before our Supreme Court in which this question was raised the court said:

"Having in mind that the primary purpose of Act No. 340, Pub. Acts 1927, was that of highway construction and improvement, and that the relocation of the railroad right of way was inseparably connected with the project, we hold that the working out of the whole problem was properly delegated by the legislature to the State Highway Department under the terms of the contract embodied in the statute. The undertaking was declared by the legislature to be a public necessity. See Act No. 340, Pub. Acts 1927, sec. 4. It is conceded in plaintiff's brief that the proposed highway improvement is a public necessity which requires the taking of the railroad's present right of way. *Everything now sought to be done by the State highway commissioner is expressly authorized by the act of the legislature.* The project is one of great importance to the people of the State; and presumably under Act No. 340, Public Acts 1927, and the terms of the contract embodied therein, the complicated situation involved in this highway construction and improvement is being worked out in a more practical, economical, and advantageous manner for all parties concerned than it otherwise could have been. *The general method of procedure has the stamp of approval of the high authority in the case of Brown v. United States, supra; and this court ought not to interfere with the consummation of the contract embodied in Act No. 340 unless it clearly contravenes constitutional provisions.* * * * *Such legislation can and should be sustained because the relocation of the railroad right of way has been rendered necessary by and incident to the highway improvement; and the property sought is being taken for public use. We do not find that the statutes involved offend against the Constitution or that there is any irregularity in the proceeding conducted by the State highway commissioner."*

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In the second case arising out of this project our Supreme Court settled a decree and used therein the following language:

> "This is a highway project and the property and property rights in question are being properly acquired for highway uses and purposes under the provisions of Act No. 352 of the Public Acts of 1925 as amended by Act No. 92 of the Public Acts of 1927".
>
> Decree in Johnstone v. D. G. H. & M. Ry. Co., 245 Mich. 65.

In the present case the Statutory Court for the Eastern District of Michigan, Southern Division, summed up the situation and disposed of this contention in the following language:

> "It is claimed by the plaintiffs that, because their land, if taken as sought, will itself be used not by the state as a part of the proposed new highway, but by a railway company as a part of its right of way, such land is being taken not for highway purposes, within the meaning of the law, but for railroad purposes, and that therefore it cannot be condemned under the so-called highway condemnation statutes of Michigan, as the state is seeking to do, but only under the railroad condemnation statutes of the state, and as these railroad statutes, it is said by the plaintiffs, afford a more liberal and favorable measure of damages to the owners of property taken thereunder, the plaintiffs insist that in the present case they are discriminated against, as compared with the owners of property condemned by railroad companies in other cases; and that consequently they are being denied the equal protection of the laws guaranteed to them by the Federal Constitution. I cannot agree with this argument, which, I think,

is completely answered and overruled by the decision of the United States Supreme Court in Brown vs. United States, 263 U. S. 78. Under the principle applied in that case, I am satisfied that, in view of the object here sought to be accomplished by the state, the taking of this land must be regarded as a reasonable adaption of proper means for the acquisition of this land for highway purposes and that the fact that such land is not to be physically used as a part of the highway thus sought to be constructed does not change the real nature of the transaction, which is the taking of land for the widening of a public highway. The same principle was announced and applied, under substantially similar circumstances, in Pitznogle vs. Western Maryland Railroad Co., 119 Md. 673, 87 Atl. 917, and Rogers vs. Bradshaw, 20 Johnson (N. Y.), 735. *This condemnation proceeding is brought by the state, in its own interest and for its own public purposes, and not by, nor on behalf of, a railroad company; and its object is the condemnation and taking of property for the purpose of improving a public highway and not for any railroad purpose.* There is, therefore, no sound basis for this contention that the proceedings here sought to be enjoined will result in either the denial of the equal protection of the laws or the deprivation of property without due process of law."

The appellant argued that this court in its decision in the case of Brown vs. United States, 263 U. S. 78, did not have before it any question of a denial of the equal protection of the laws and that therefore it was not to be considered an authority in their case. We called the court's attention to the fact that in the Brown case since the ultimate use of the property was in a large number of instances to be private, (because the person to whom the property was to be traded would use it for private dwellings or stores or similar uses), the claim was made that the taking was for a private and not a public purpose

and therefore prohibited by the Constitution. *It was therefore necessary for the lower court in that case to determine whether or not the legal purpose of the taking of the property was to be determined by the character of the ultimate physical use to which the property would be devoted after it had been acquired and traded.*

Very property *that court* held that the legal purpose for the taking was the same as the purpose for which the land to be used for the reservoir was taken. This court in recognizing that the acquirement of the appellant's land in that case was so closely connected with the taking of the land actually to be physically used for the reservoir "that the public use of the reservoir covered the taking of the town site", established a fundamental rule which the lower court in this case and our own State Supreme Court in the two cases before it, held, governed the taking of property by the State in the present situation.

Our State Supreme Court has held that the acquisition of this plaintiff's land for the purpose of trading it for that part of the old right of way which was to be actually used for the new highway was so closely connected with the acquirement of property for the highway itself as to be a part of the highway project. The close interconnection has thus been established by our State tribunal just as the lower court in the Brown case found that the acquisition of the plaintiff's land there was so closely connected with the building of the reservoir as to be covered by the public purpose which warranted the construction of that irrigation project. In this case the appellant seeks to present to this court the same argument presented on behalf of the appellant in the Brown case. He argues that since the actual and ultimate physical use to which the land is to be devoted after it has been acquired and traded to the railroad is a railroad use, the character

of the legal purpose is to be determined from that fact. We believe that the correct rule was established in the Brown case and that when it can be demonstrated that property is being acquired for the purpose of trading it for other property which will be physically used for a highway purpose, the property so acquired is being taken for a highway purpose. *Our State Supreme Court and the District Court in this case have squarely and emphatically held that the problems attendant upon the acquirement of a few miles of right of way out of the heart of a great railroad system through condemnation are so great as to make it almost impossible.*

Our State Supreme Court has held that the solution adopted by the Legislature in Act No. 340, Public Acts of 1927, whereby the State agreed to procure a new right of way to be exchanged for the old, was "being worked out in a more practical, economical and advantageous manner for all parties concerned than it otherwise could have been". The court had said that:

> "Having in mind that the primary purpose of Act No. 340, Public Acts of 1927, was that of highway construction and improvement and that the relocation of the railroad right of way was inseparably connected with the project, we hold that the working out of the whole problem was properly delegated by the Legislature to the State Highway Department under the terms of the contract embodied in the statute".
>
> Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649.

It is difficult to conceive of a case more closely paralleling the situation in our case than is presented by the facts in the Brown case.

In the Brown case, the appellant in his brief said:

> *"It is clear, we think, that the right of the government to condemn the land in question must be denied unless the project contemplates the use of the said land in some intimate manner connected with the construction of the reservoir in question,* and the government in this case provides us with no such connection. * * * *In condemning this land, the government does not desire to retain it but to dispose of it and this disposition to the public is not, and cannot be, a public use.* No agent or instrumentality of the government intends or proposes to use the land in question."

This court was therefore confronted with the precise question involved in this case. The plaintiffs were there vigorously asserting that the actual and ultimate physical use to which the property was to be put after the government had acquired it and traded it was controlling in determining whether the use for which the land was taken was a public use or a private use. The District Court recognized that fact, passed squarely on that point and *made it clear that the actual uses made of the property after the taking and the exchange, had nothing to do with determining the legal character and nature of the purpose for which the property was taken.* This court upheld that view. *This reasoning applied to our case means that the fact that the land is to be traded to a railroad and perhaps devoted to railroad uses after that exchange is not to be considered by the court in any way in deciding the first and most important question in this case,—the exact nature and character of the purpose for which the land is taken.*

The fact that there was no question raised with regard to a denial of the equal protection of the laws in the

Brown case is unimportant. *We must first determine the rule to be followed in naming the character of the legal purpose authorizing the taking of this appellant's property. Having settled upon the rule and applied it to the facts in our case, if we reach the conclusion that this is a taking for "highway purposes" there can be no question of a denial of the equal protection of the laws when the usual and regular highway condemnation statutes are employed, as in our case.*

The District Court in the Brown case pointed out that the government was confronted with innumerable difficulties in trying to take the property in the old town site. In our case the State is confronted with difficulties equally insurmountable. It is to be doubted whether the State could successfully condemn a nine-mile strip out of the heart of this railroad for this public highway project. The difficulty of appraisal even though it could be legally condemned can be appreciated. To quote from the language of the District Court: "it may be fairly concluded that without such authority it would be impractical for the (State) to execute the (highway) project."

3. Other authorities sustain the state's position.

This court cited, in support of its position in the Brown case, the case of Pitznogle vs. Western Maryland Railroad Co., 119 Md. 673, 87 Atlantic 917. The Chief Justice has stated the facts in that case to be that,—

> "A railroad company condemned a piece of land for its tracks and yards and in doing so appropriated a private right of way which was the only access of certain other land owners to the public highway. It was held that the railway company could condemn an

additional strip of land for a substitute right of way to be furnished to these land owners."

The plaintiffs in that case contended:

"(2) That the petition is insufficient as a basis of a judgment of condemnation, *because all of the land sought to be acquired thereby is not, as alleged in the petition, to be used for railroad purposes, but a part of it is to be used 'for the location of a substitute private road in place of the existing private road,'* which is to be closed and used by the petitioner for railroad purposes."

The court discussed the proposition that, while there was no express prohibition in the state constitution against the taking of private property for private use, the general interpretation of the constitution did prohibit such a taking. The court, therefore, had before it precisely the same problem that is presented by our case. If the use of the land was to be declared a private use, because after it had been taken and exchanged, the actual physical use to be made of it was to be that of a private way, the railroad would clearly be exceeding its power and the proceeding would fail. The court in commenting on this said:

"It is not contended by the defendants that the use of the land for railroad purposes is a private and not a public use, *but they contend that the use of a part of the land for the location of a private road in substitution for the existing private road, which is to be closed and used by the plaintiff company for railroad purposes, is a private use of said land;* and that inasmuch as the petition does not state or designate how much and what part of the entire parcel of land so sought to be condemned is to be used for the location of said private road, and

how much and what part is to be used for railroad purposes, the whole must fall. *The correctness of this contention must be conceded, should we hold, under the facts and circumstances of this case, that the use of a part of said lands for such private road or way is a private use and not a public use. But is it a private use? • • • Without the use of this road or private way for the purposes that we have mentioned, the plaintiff would be defeated in its proposed plan of straightening its road and of enlarging its yard, and to close this road without substituting for it another road or way would deprive those entitled to its use of the means of reaching the pike from their homes, and they would not be permitted to condemn a private road or way (Arnsperger v. Crawford, supra) in substitution for the road lost to them, resulting from its necessary use for railroad purposes, which the court has time and again said was a public, and not a private, use. • • • The condemnation of a part of this land here sought to be condemned for a substitute private road or way is incident to and results from the taking by reason of public necessity, of the existing private road for public use, and the use of it for such purposes should, we think, be regarded as a public use within the meaning of the Constitution.*"

Pitznogle v. Western Maryland R. R. Co., 119 Md. 673, 87 Atl. 917.

It will be seen that the plaintiffs in that case raised precisely the same question as that now confronting this court. If the ultimate use to which the land taken was to be devoted had governed, it would have been a taking for a private use unquestionably, and the court recognized this fact when it said:

"The correctness of this contention must be conceded should we hold under the facts and circum-

stances of this case, that the use of part of said lands for such private road or way is a private use and not a public use."

The court rejected that theory and emphatically said that the character of the whole project was determined by the use to which the land for which it was exchanged was to be put.

We have discovered that there is yet another case to be found in the United States involving this same problem. This was a case decided in February, 1823, by the Supreme Court of the State of New York. In that case, the action was for a trespass. The defendant was performing work in building or constructing a canal for the state. It became necessary to take part of the turnpike belonging to a private corporation in order that the canal might be properly completed. The plaintiff's land had been condemned for the purpose of trading it to the turnpike company for the relocation of their private turnpike. The defendant justified on that ground. The court had this to say:

"It was shown in proof, that the route of the northern canal, at the place in question, was directed by the chief engineer; *that the turnpike road adjoining the place where the trespass was alleged to have been committed, was unavoidably encroached on by the tract or course of the canal, and that another road was indispensable at that place,* and must have been made before the canal was commenced.

"Here the question occurs: Were not the Commissioners authorized, by this act, to enter upon the land of the defendant in error, and to use it to the extent and in the manner stated in the record? The Supreme Court have answered the question in the

negative, *because they say, the entry was not for the prosecution of the canal improvements, but to make a substitute for part of the turnpike road, which was broken up and taken for the canal. But if the turnpike road was unavoidably encroached on by the canal, and another road was indispensable at that place, before the canal was commenced, and the land taken was necessary for the road, (and all this was proved in the cause,) it would seem to follow, as a clear logical deduction, that the land taken was necessary for the prosecution of the improvements intended by the act. It is very certain, according to the testimony, that the improvement of the canal, at the place specified, could not be prosecuted without the road; and if so, the road was necessary for the improvement.* Besides, the commissioners were made the judges as to what lands were necessary for the prosecution of the improvements;

"*Upon the very straitened construction set up, on the part of the defendant in error, it might truly be said that if the course of the canal met a house or barn, or barrack, or shed, standing in its way, it could not be removed to the right hand or to the left, and placed upon the adjoining land, of the same owner, without committing a trespass upon that land. It might just as well be said, in such case, as it has been said in this, that the new ground taken for the occupation of the building, was not taken for any purpose immediately connected with the canal, but as a substitute for the site of a house or barn, which was broken up and taken for the canal*". Rogers v. Bradshaw, 20 Johnson, 735.

The court had presented to it precisely the same problems and questions we have before us, and the contention was made that the character of the use for which the land was taken was to be determined by the ultimate and actual physical use to which it was to be put. In that case, after it had been traded to the turnpike com-

pany, it was to be used physically for a turnpike. The court disposed of that contention, however, and said that the taking was for canal purposes. As the court concluded, after setting up the hypothetical cases where a house or barn should be moved to the right or left to make way for the canal:

> *"It might just as well be said in such case, as has been said in this case, that the new ground taken for the occupation of the building, was not taken for any purpose immediately connected with the canal, but as a substitute for the site of house or barn which was broken up and taken for the canal."*

The three cases we have quoted from rather liberally above indicate that in all of those cases where the question has been raised, the courts have uniformly decided that the character of the public use to which the land taken is to be devoted is determined by the nature of the public use to which the land for which it is traded is devoted. In no instance has the actual physical use made of the land after the exchange been determinative of the legal character of the public use. In the Brown case the actual physical uses were, as we have set forth, of an unnumbered variety. Some of the uses may have been public. Certainly a large number of the uses were private. If the argument advanced by the appellant in our case is to be considered at all, it must result in a manifest absurdity. A different statute for the condemnation of each separate parcel of land in the new town site would have been called into play because each parcel may have been used for some purpose differing from the use to which the other lots or parcels were put. If any of the lots were to be devoted to private uses, the property could not be taken because of the constitutional prohibition against a taking for a private purpose. As an

actual matter of fact, only one statute was used. *The determination of the court that all the parcels of property used for the new town site were being taken for irrigation purposes, classified the project and the purpose of the taking, and that classification determined which statute should be used.*

In the Pitznogle case the same argument and reasoning is to be found. The railroad was taking the additional property under the railroad condemnation statute. It could not have condemned under any other statute. If the plaintiffs' contentions were right, the taking was for a private purpose and the railroad had no authority whatsoever. Yet, we find the court calling this a taking for railroad purposes. In the New York case the taking was likewise for canal purposes and the canal condemnation statutes were used. There was no denial of the equal protection of the laws in any of these cases.

4. *Different highway uses will vary the elements and amount of damages but will not change the legal character of that use.*

In determining the amount of damage suffered by a property holder where part of his property is taken, the use to which the property taken will be put is, of course, important. In taking property under the highway statutes, if the property taken is used for the actual laying out of the highway, the elements of damage will be measured and circumscribed by that fact. If the actual highway use for which the land is taken is for the excavation of gravel and it results in a great yawning pit close to a beautiful residence located on the balance of that tract of land, the elements of damage which

must be taken into consideration in fixing compensation will necessarily be different from those involved in the case where the land is actually devoted to the laying out of the highway. This variation in the elements of damage will undoubtedly result in a great variation in the actual damages paid for the taking of the property. This is the law of Michigan, and it was so determined by our State Supreme Court in its two decisions which have heretofore been handed down in this matter. The fact that, instead of the appellants' property being actually used for one of the two highway purposes just mentioned, it is going to be used for another highway purpose, may and undoubtedly will, bring into the problem new and different elements of damage for which they must be compensated. The physical presence of the railroad upon the property will be an added or different element to be considered by the commissioners in assessing compensation, just as the fact that if a pit were to be dug upon the property it would of necessity vary the factual situation. Our Supreme Court, in considering this precise question, involved in this project said:

> "In the present case as in an ordinary proceeding for condemning a right of way for a railroad, it will be the duty of the commission 'to compensate the owner for what his landed interest will suffer from the use proposed to be made of it by the railway company.'"
>
> Fitzsimmons & Galvin, Inc. v. Rogers, supra.

It does not, however, lay any foundation for a claim of a violation of the due process or equal protection clause of the Federal Constitution.

The legislature of the State of Michigan has given its attention to the problems involved and has specifically

termed this a taking for highway purposes. Its expressions on that point are to be found in the statutes the State is employing in this project. Our State Supreme Court has twice passed on the question and each time held this to be a taking for highway purposes. Our State Highway Department has proceeded to take the property for highway purposes and upon that theory has spent several millions of dollars and acquired all the needed property with the exception of the few parcels involved in these cases. The State Administrative Board, the Governor, the State Treasurer, the Attorney General, and all the State officers concerned have by their official acts, in perfect good faith, interpreted the whole matter in the light of its being a highway purpose. The imperative necessity for widening Woodward Avenue has been the cause of the whole undertaking.

5. *The state highway commissioner possesses authority to acquire lands to be traded to a railroad for a new right of way where part of the old line is needed for the widening of a public highway.*

The highway commissioner undoubtedly possesses the power to acquire lands for this special trading purpose. In Section 23 of Act 352 of the Public Acts of 1925, which is the highway condemnation statute, under which we are acquiring appellant's property, we find the following provision:

> "The provisions of this chapter shall be deemed to extend to and include the right • • • to acquire and take property desired by the commissioner or commissioners to exchange for other property which

in his or their opinion it is necessary to acquire for public highway purposes whenever he or they have agreed in writing with the owner or owners of such property for such exchange. * *"

In addition to this section, a special act was passed by our Legislature for the sole purpose of authorizing such trades. This was act 215, P. A. 1925. Section 1 of that statute reads:

"Whenever the line of any railroad or railway company is upon or adjacent to the right of way of a trunk line highway and such right of way or any part thereof, is necessary to be acquired for widening, straightening, altering or otherwise improving such highway, the state highway commissioner shall be authorized to enter into negotiations with such railroad or railway company for the purchase of said right of way, or of any part thereof, and to enter into an agreement with any such railroad or railway company to exchange other designated property for such right of way, or for any part thereof, whenever such other designated property shall be acquired by him; and whenever any such agreement has been entered into, the said state highway commissioner shall be authorized and he is hereby empowered to acquire such other property by purchase or condemnation, and when acquired to execute the necessary conveyances and releases thereof to such railroad or railway company for its use, and to take in exchange therefor the railroad or railway right of way or part thereof for such public highway purposes in accordance with such agreement."

Our State Supreme Court, in the cases of Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649, and Johnstone, et al v. D. G. H. & M. 245 Mich. 65, has placed its stamp of approval upon the authority conferred upon the highway commissioner by these two statutory provisions. The court said:

"Many cases cited in plaintiff's brief are distinguishable from the instant case in that the right of eminent domain was there attempted to be exercised to accomplish a purpose not authorized by law; *but here we have a case wherein the state highway commissioner has been specifically authorized and empowered by legislative enactment to do exactly that which he seeks to accomplish in this proceeding. Such legislation can and should be sustained because the relocation of the railroad right of way has been rendered necessary by and incident to the highway improvement; and the property sought is being taken for public use.*"

Fitzsimmons & Galvin Inc. v. Rogers, 243 Mich. 649.

These words by our State Supreme Court leave no room for doubt. The State Highway Commissioner in exercising the authority conferred upon him by these statutory enactments has proceeded to acquire practically all of the land needed for this exchange. In Act 340, P. A. 1927, we find set forth the entire contract entered into between the State and the railroad company for the exchange of the new right of way for the old as authorized by Act 215, P. A. 1925, and Section 23 of Act 352, P. A. 1925, referred to above. In Section 1 of the act setting forth the contract, we find additional authority conferred upon the state to acquire these lands for trading purposes. *Since our Supreme Court has considered all of these acts and has interpreted them to mean that the highway commissioner is specifically authorized to acquire lands for the purpose of trading them, to this particular railroad, the appellants' objections on this score are without force.*

B. *The Michigan Supreme Court has held that this*

property should be acquired under the provisions of the highway condemnation statute.

The appellant has argued that the Legislature has authorized the use of any one of three condemnation statutes. He contends that this has given an arbitrary power to the Commissioner which denies him the equal protection of the laws. *Our State Supreme Court has passed upon the statutes conferring power upon the Highway Commissioner and has emphatically said that he is only empowered to use the highway condemnation statute.* The court has considered the claims here advanced by this appellant and has said that neither of the other two statutes he mentions can be considered applicable. This interpretation of the statutes authorizing the Highway Commissioner to condemn this property, is the construction which must of course be followed by this court.

The appellant's argument that Section 2, Act 215, authorizes the use of "either one of two separate, distinct, and different condemnation acts" is not valid in the face of our Supreme Court's declaration that this section directs him to use only the highway condemnation statute.

In the cases before our State Supreme Court the contention was quite seriously made that when Section 2 of Act 215, P. A. 1925, specified that the procedure to be used in condemning the land should be that "provided for the condemnation by state agencies and public corporations", it did not mean that the statute ordinarily used for the condemnation of property for highway purposes should be employed. Our Supreme Court rather shortly dismissed that argument after pointing out that in the act authorizing the contract between the State and

the railroad company (Act 340, P. A. 1927) the state highway commissioner had been authorized to secure the right of way "in accordance with the general laws of the State". The court said:

> "We are of the opinion that the Legislature intended that the state highway commissioner in carrying into effect the provisions of Act 340, P. A. 1927, should proceed as far as possible in conformity with the provisions of the highway condemnation law; and that by his so doing the plaintiff will not be deprived of property without just compensation, or without due process of law."
>
> Fitzsimmons & Galvin, Inc. v. Rogers, supra.

This position was reaffirmed in the second case before our court arising out of this same project, although it did not discuss that question at any great length. In the decree in this last case the Supreme Court said:

> "This is a highway project and the property and property rights in question are being properly acquired for highway uses and purposes under the provisions of Act No. 352 of the Public Acts of 1925 as amended by Act No. 92 of the Public Acts of 1927."
>
> Johnstone v. D. G. H. & M. Ry. Co., supra.

C. *The Michigan Supreme Court has held that the State has observed all the statutory requirements and the property is being acquired in accordance with due process of law.*

The two opinions of our Supreme Court we have repeatedly referred to, are both full of expressions indicating that the State has carefully observed all of the re-

quirements contained in the highway condemnation statute under which we are proceeding. The decision in the first case before that Court contains many statements bearing out our contention. The court at one point said:

> " * * * but the contention is rightly made by the plaintiff herein that since we have certain constitutional and statutory provisions which specify the methods and conditions of exercising this power, the state as well as every other agency which utilizes this method of acquiring private property must proceed in accordance with the constitutional limitations and with the provisions of the statute insofar as they do not contravene the constitution."
> Fitzsimmons & Galvin, Inc. v. Rogers, supra.

The court then proceeded to consider one after another of the various objections which were raised and which are now presented to this court and concluded their opinion with the following significant language:

> "We do not find that the statutes involved offend against the constitution *or that there is any irregularity in the proceeding conducted by the State Highway Commissioner.*"

The appellant did not at any time in his argument before the lower court in this case present any proof or make any claim that we were not scrupulously following the exact letter of the highway condemnation statute. The question of whether due process has been observed has been feebly advanced. In view of the fact that our court has held that we have observed all of the statutory requirements, such a claim is without merit.

The statute under which we are proceeding provides:

"The highway act under which the commissioner is here proceeding provides for a determination of necessity by a hearing before the state highway commissioner and for an assessment of damages by three court commissioners. Act 352, P. A. 1925, Sec. 7. This, we think, fully protects the plaintiff's constitutional rights."

Fitzsimmons & Galvin, Inc. v. Rogers, supra.

D. *Interpretation of our state statutes by our Supreme Court is binding upon Federal Courts.*

1. The construction and constitutionality of state statutes by a State Supreme Court will govern the Federal Courts.

The state statutes involved in this case have been set forth in their entirety in the appendix to this brief. These various statutes have been construed by our State Supreme Court. The decisions of that Court construing these statutes are, of course, binding upon the Federal Courts.

"In the construction of local statutes, the decision of a state court of last resort will govern the Federal courts * * *."

27 R. C. L. 44.

The same is true with regard to the question of whether a statute violates our State Constitution.

"A decision of a state court of last resort that a state law is not in conflict with the state constitution is binding on the Federal courts * * *."

West v. Louisiana, 194, U. S. 258, 48 L. ed. 965.

The general rule regarding the construction and constitutionality of state statutes has been discussed at great length in Ruling Case Law:

> "It has long been recognized that the highest court of the state is the one having the right finally to determine whether an act of a state legislature, passed with the usual forms necessary to its validity is in fact in violation of the state constitution, *and in cases reaching the federal courts the latter usually will not consider questions as to whether state laws violate provisions of the state constitution.* * * * *Even the Supreme Court of the United States will accept the interpretation of a statute of a state affixed to it by its court of last resort.*"
> 6 R. C. L. 85.

That authority has also said:

> "Thus, in passing on the constitutionality of a state statute, the Supreme Court of the United States will follow the decisions of the state court of last resort, as to the purpose and scope of the statute, and will only determine whether the statute as so construed is in conflict with the federal constitution. This same rule of federal acquiescence in the construction of state enactments is applied to state constitutional provisions where the question is raised as to whether they conflict with the constitution of the United States. All state enactments, whether in the form of laws or constitutional provisions, may come within the general rule under consideration, and the construction applied to them by state tribunals will normally be accepted by the federal courts."
> 6 R. C. L. 87.

In a case before the Supreme Court of the United States, we find a declaration to the same effect:

"In exercising that jurisdiction, it was nevertheless the duty of the trial court to follow and be guided by the decisions of the highest state court upon the construction of the statute, and upon the question whether as construed the statute violated any provision of the state constitution. The same duty rests upon this court and it has been so determined from the earliest period of its history. * * * We should not be justified in holding the act to be in violation of the state constitution in the face of clear and repeated decisions of the highest court of the state to the contrary, under the pretext that we are deciding principles of general constitutional law. If the act violates any provision, expressed or properly implied, of the federal constitution, it is our duty to so declare it, but if it do not, there is no justification for the federal courts to run counter to the decisions of the highest state courts upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."

Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369,

General American Tank Car Corp., v. Day, 270 U. S. 367, 70 L. ed. 635,

Ashe v. U. S., 270 U. S. 424, 70 L. ed. 662,

Palmer v. Ohio, 248 U. S. 32, 63 L. ed. 108.

As we have pointed out in the earlier pages of this brief, the appellant's entire case revolves about his contention that the state should proceed under the provisions of the so-called "railroad" condemnation statutes instead of using the regular "highway" condemnation law. When the appellant raises the point that the district court erred because it failed to find that our state statutes directed the use of the railroad statutes instead of the highway acts, he has overlooked the fact that our State Supreme Court has construed the various statutes

in question and has said that the state is directed by the legislature to use the "highway" statutes and not the "railroad" statutes. He is asking this court to ignore the construction of Michigan statutes by the Michigan Supreme Court. In the case of Fitzsimmons & Galvin, Inc., v. Rogers, 243 Mich. 649, our court passed upon the meaning of that part of Act No. 340 of the Public Acts of 1927 which authorized the condemnation by the State Highway Commissioner of the property needed for this project. The court said:

> "By Act No. 340, Pub. Acts 1927, Sec. 4, the State highway commissioner is authorized and empowered to secure this right of way 'in accordance with the general laws of the State.' The present proceeding instituted by him is 'in accordance with the general laws of the State;' and if those laws are properly administered plaintiff's rights as to just compensation will be fully respected. *A reference to the railroad act will disclose several reasons why it would be impossible for the State highway commissioner to file a petition thereunder.* For example, that statute (2 Comp. Laws 1915, Sec. 8252) requires the petition to be in the name of the railroad company, and to be signed and sworn to by a director or other representative of the railroad company. *We are of the opinion that the legislature intended that the State highway commissioner, in carrying into effect the provisions of Act No. 340, Pub. Acts 1927, should proceed as far as possible in conformity with the provisions of the highway condemnation law; and that by his so doing the plaintiff will not be deprived of property without just compensation, or without due process of law.*"

This, we believe, effectively disposes of all those claims of error based upon a so-called erroneous interpretation of Act No. 340 of the Public Acts of 1927 by the district

court. *In a later section we shall show that our Supreme Court has compared the highway condemnation statute with the railroad statute and has said that the measure of damages is the same under either act. This interpretation is binding upon this court.*

E. *Regardless of whether the property is being acquired for highway purposes or for railroad uses, a proper classification has been adopted and the use of the highway statutes in acquiring the property is justified.*

1. The Legislature has a wide range of discretion in establishing classifications.

Assuming for the purposes of this argument only, that this is a taking for railroad purposes rather than highway uses, there yet remains the question of whether the classification adopted is reasonable. It is the state's position that regardless of whether this is a taking for highway or for railroad purposes, the peculiar facts and circumstances to be found in this case justify and warrant the use of the statutes employed for the condemnation proceeding, and that the classification is reasonable. The fact that this might be regarded as a taking for railroad purposes does not mean that different railroad statutes could not be adopted and used, where the legislature felt that the facts warranted the establishment of a classification and the adoption of different modes of procedure for the different classes so set up. The general rule with regard to classification is well expressed in Ruling Case Law where it is said:

"In the exercise of its power to make classifica-

tions for the purpose of enacting laws over matters within its jurisdiction the state is recognized as enjoying a wide range of discretion. *The question of classification is primarily for the legislature, and it can never become a judicial question except for the purpose of determining, in any given situation, whether the legislative action is clearly unreasonable.*"

6 R. C. L. 384.

When a classification of any kind is attacked in the courts, the question, as it presents itself to the court, is not whether the court believes the classification is reasonable but whether or not the legislature might not have reasonably determined it to be so. Or, to put it in other words:

"Before a court can interfere with the legislative judgment, it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. When the classification in a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."

6 R. C. L. 385.

Certainly, in our case there is presented a more than reasonable ground for distinguishing and for setting up the classification established, if we are to consider it as such. It is not necessary that there be an exact and scientific line drawn, or that the classification be based upon some particularly outstanding difference, characteristic of the group or class distinguished from all others.

"But if the classification is not wholly unreason-

able and arbitrary so that the statute is uniform in its operation on all the members of the class to which it is made applicable, no one is denied the equal protection of the laws guaranteed by the Federal Constitution. It has been said that it will be upheld unless it is so manifestly inequitable and unjust that it will cause an imposition of burdens on one class to the exclusion of another without reasonable distinction."

6 R. C. L. 380.

The court must be able to say that there is no reasonable relation to the object within the governmental authority.

Chicago B. & Q. R. R. Co. v. McGuire, 210 U. S. 549, 31 Sup. Ct. 259; 55 L. ed. 328.

It must say that the classification is clearly arbitrary and unreasonable:

"This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the states the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the Court can declare it beyond the legislative authority. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78, and previous cases in this court cited on page 79. That a law may work hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the Legislature must be allowed a wide field of choice in determining the subject matter of its laws, what shall come within them, and what shall be excluded."

Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. ed. 364.

In view of all the great differences between the ordinary case of a railroad starting to build for the first time and the present instance where there is a relocation with all its attendant problems; in view of the fact that this will be a special rapid transit service instead of an ordinary railroad line, we are sure that there is every reason to distinguish between the ordinary railroad condemnation proceeding and the present case. With the authority to lay down different statutes for different railroads it is certainly possible to differentiate between the taking by a railroad for ordinary purposes and a taking for these special purposes by the State.

The appellant's objections to the use of the highway statutes are based on the claims that he is being denied a trial by jury on both the question of necessity and damages; that he cannot recover attorney's fees under the highway statutes allowed him by the railroad statutes; and that the measure of damages was not the same in the two acts. As we have pointed out elsewhere in this brief, our State Supreme Court has considered these objections and has construed the two statutes to be substantially the same, so far as the important claimed differences are concerned. In a Montana case where property was being taken for irrigation purposes, an objection was raised that a certain irrigation statute should be used rather than the statute actually employed in the case. The objection in the words of the court was:

> "That the statute denies to one originally in the district the right of jury trial upon the question of benefits received or damages suffered by his land; and that it discriminates in favor of the landowner whose property is brought into the district after it is organized by extending to him the right to have the

question of benefits or damages determined by a jury."

In re. Valley Center Drain Dist., 64 Mont. 545, 211 P. 218.

It will be noted that the objection in that case was precisely parallel with the objection in our own case. The plaintiffs there contended that since there was a different procedure prescribed for some of those whose land was taken for the irrigation project, there was a denial of the equal protection of the laws. Every land owner in that case was having his property taken for the irrigation project, just as in our case the appellant contends that all the property owners are having their land taken for railroad purposes. The contention was made in that case that, since all the land taken was to be devoted to irrigation purposes, the same statutes must be used in all cases, and every property owner was entitled to exactly the same type and form of procedure. The denial of a jury was one of the major differences complained of. It is difficult to imagine a case that comes closer to our own. The court, however, disposed of that argument in the following words:

"The statute does not deny to the land owners, whose properties are included in the district originally, the equal protection of the law. The rule that general laws shall operate uniformly does not prohibit a reasonable classification of subjects. *The situation of the land owner whose property is originally in the district is so very different from that of the land owner whose property is brought in after the district is created, as to furnish the basis for a reasonable classification; hence, the statute is not open to this objection.* In re Organization of Bench Canal Drainage Dist., 24 Wyo. 143, 156 P. 610."

In re Valley Center Drain Dist., 64 Mont. 545, 211 P. 218.

The application of the court's reasoning in that case to the facts in our own case makes the conclusion inescapable that there is more than ample reason for distinguishing between the position of property owners whose land is being taken for a new railroad on one hand and for the relocation of an old railroad on the other hand.

In a California case a municipal water and power company was seeking to take land by eminent domain for the establishment of a city water system. This property was being taken from a privately owned water power company. Instead of using the ordinary procedure prescribed in the general law, a special procedure was authorized. The contention was made that this denied the plaintiffs the equal protection of the laws. In the words of the court in stating the facts:

> "The contention that the procedure authorized by the Public Utilities Act deprives the appellant of the equal protection of the laws is based upon the discriminations to which we have just referred between the mode of condemning property under the general law and that provided by section 47 for condemning the property of public utilities in certain cases. None of these discriminations as we have seen goes to any matter of especial justice or fundamental right. *The constitutional provision under consideration does not prohibit a state from establishing different rules of procedure for different classes of cases or litigants, provided the variations relate to matters of procedure and do not operate to deprive any class of substantial equalities in the adjudication of its rights or liabilities.* 12 C. J. 948, Cin. State R. R. Co. v. Snell, 193 U. S. 30, 24 Sup. Ct. 319, 48 L. ed. 604, Cook v. Ray Mfg. Co., 159 Cal. 694,

115 P. 318. *In condemnation proceedings, so long as the state provides a fair and equitable and judicial inquiry in which the parties interested are allowed to be heard and present evidence and are protected in their right to have just compensation, they are not deprived of the equal protection of the laws because the state, under authority of its own Constitution, has seen fit to provide for other classes of cases a different method or a different tribunal for accomplishing the same result.* Ry. Co. v. Tel. Co., 65 S. C. 459, 43 S. E. 970; Kennebec Water D. v. Waterville, 96 Md. 234, 52 Atl. 774. "

Marin Municipal Water Dist. v. Marin Water & P. Co., 178 Cal. 308, 173 P. 469.

In that case the general statute applicable to those ases where property was being taken by the state or unicipality for such purposes was not used. Instead, special procedure was employed and the same objecion was there raised as we now find confronting us in ur cases. The court's argument, in disposing of the qual protection theory in that case, is equally applicable o the situation in the instant case.

A somewhat similar situation is presented in an Iowa ase. Property was being taken by a school district for chool purposes. In Iowa, there is a general statute uthorizing the use of the power of eminent domain for orks of internal improvement. The taking in that case as under a special statute, and the argument was made hat the plaintiffs were denied the equal protection of the aws because the general statute had not been followed. he plaintiff pointed out a number of differences beween the two statutes.

"The argument of counsel in support of this posi-

tion is, in effect, that the distinction made by the statute between proceedings for condemnation of works of internal improvement generally and proceedings for condemnation for schoolhouse sites is an unreasonable and arbitrary discrimination which contravenes the constitutional rule. We are not persuaded that the distinction is either unnatural or arbitrary. *To constitute a violation of the constitutional provisions in this respect, the unreasonable character of the discrimination must clearly appear. It is not enough that it may seem to the court unwise or unnecessary, but its arbitrary character must admit of no reasonable doubt.*"

Munn v. Independent School Dist., 188 Ia. 757, 176 N. W. 811.

These cases certainly make it clear that the right and power to classify in eminent domain is not to be denied upon any such ground as that advanced by the appellants in our cases. They are being deprived of no substantial thing, because our court has held *that they will receive just compensation.* The courts have said that to doubt the validity and reasonableness of a classification is to resolve in favor of its constitutionality. It is the general rule that before the courts can say that a classification established by the legislature shall not stand, it must appear that it is essentially "arbitrary and not merely possibly but clearly and actually unreasonable." (6 R. C. L. 385.)

The Supreme Court of our State has made it clear that no matter what procedure may be used, the constitution requires the payment of "just compensation" and has defined that to be,—

"In the present case, as in an ordinary proceeding

for condemning a right of way for a railroad, it will be the duty of the Commissioners 'to compensate the owner for what his landed interest will suffer from the use proposed to be made of it by the railroad company.' Barnes v. R. R. Co., 65 Mich. 251. *Adequate compensation is such only as puts the injured party in as good condition as he would have been in if the injury had not been inflicted. It includes the value of the land or the amount to which the value of the property from which it is taken is depreciated.* Grand Rapids, etc. R. R. Co. v. Heisel, 47 Mich. 393. *There is no provision in our statutes for offsetting benefits against damages incident to taking land for a railroad right of way; and in the absence of an express statutory provision, such a deduction cannot be made.* Detroit, etc. R. R. Co. v. National Bank, 196 Mich. 660; State Highway Commissioner v. Breisacher, 231 Mich. 317. With this construction placed upon the highway act, it is not subject to the objection that it fails to provide adequate compensation for the property owner and is, therefore, unconstitutional. Nor does it leave force to plaintiff's contention that since it is here sought to condemn a railroad right of way, the procedure must be under and in accordance with the general railroad act rather than under the highway law."

Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649.

In the other case before our Court we find a further explanation indicating that the statute we are using will fully protect the appellant and assure him of just compensation.

"Section 4, Act 92, Pub. Acts 1927, provides for determination by the State highway commissioner of the damages which should be paid as compensation for the taking of each parcel of property. This determination with payment, tender or deposit of

the award for the benefit of the owner is the basis for the state's taking possession. Subsequent proceedings for final appraisal of compensation by commissioners appointed by a court follow in due course. The determination by the state highway commissioner will so establish the condemnation proceedings as to insure plaintiffs and all others similarly situated an opportunity to obtain adequate compensation."

Johnstone v. D. G. H. & M. Ry. Co. supra.

Apparently the plaintiffs are contending that they are entitled to something more than "just compensation" and that if some other statute might possibly confer a greater amount of damages, they are denied the equal protection of the laws, even though the statute under which their property is taken complies in all particulars with the due process clause and furnishes just and adequate compensation. Yet they have not attempted to argue that the offsetting of benefits will in any way deprive them of any part of "just compensation". It might be remarked, in passing, that the condemnation statutes used by the Federal Government in the Brown case, supra, contains an express provision for the offsetting of benefits. We are unable to see how the question of classification can be in any way affected by the questionable contention that the actual net result in cash may vary according to the statute used. The inequality of result, if any develops, will have no bearing upon the question of whether the classification is reasonable and not aribtrary. It was pointed out in Ruling Case Law,— "the mere fact of inequality in no manner determines the matter of constitutionality".

The basis for classification in this case rests in the dif-

ference in character of the condemning agency and in the peculiar and special circumstances surrounding the project for which the property is taken. Either one of these is sufficient to justify the adoption of the procedure the State is employing. The very difficulties inherent in the project furnished an adequate reason for the legislature, and no one can say that, after considering all the many problems with which the State was confronted in constructing this highway project, it did not have ample reason to believe that the Gordian knot could best be cut by using the highway procedure. Part of the land to be acquired was to be used for constructing substitute public highways for those closed or cut off by the railroad line. Streets along the proposed new right of way were to be altered, straightened and widened. There was a great probability that instead of using any of the property for ordinary railroad purposes, it would be used for a special rapid transit system. This expectation is being fulfilled and that is to be the character of the line constructed on this property. The Rapid Transit Commission of Detroit has recommended and the State has considered the matter of making many alterations in State trunk line highways both bisecting and parallel to the new right of way. The property taken is, therefore, devoted to many different uses and purposes, in addition to part being used for a special and particular kind of railroad development. All these things, together with many others which might be named, furnished a real and certainly reasonable basis for the adoption of a special procedure in condemning the property. It most certainly was not a case of taking property for ordinary everyday railroad purposes exclusively. And in considering the matter, the court must, of course, take into consideration the fact that the burden is upon the appellant to show that the classification is clearly and unmis-

takably unreasonable. The general rule is well expressed in Ruling Case Law to be:

> "One who assails the classification in a law must carry the burden of showing that it does not rest on any reasonable basis, *but is essentially arbitrary, and not merely possibly, but clearly and actually unreasonable.*"
>
> 6 R. C. L. 385.

The appellants have made no attack upon the reasonableness of the classification except on the ground that the actual net result of the application of the two statutes may result in a different figure. They have certainly not met nor borne the burden of showing that the classification is arbitrary and clearly and actually unreasonable.

The Michigan Supreme Court, in Fitzsimmons & Galvin, Inc. v. Rogers, supra, has pointed out several reasons which would justify the classification. The Court said:

> "A reference to the railroad act will disclose several reasons why it would be impossible for the State Highway Commissioner to file a petition thereunder. For example, that statute (2 Comp. Laws 1915, sec. 8252) requires the petition to be in the name of the railroad company and to be signed and sworn to by a director or other representative of the railroad company."

The Court might have pointed out several other differences along that line, any one of which would warrant the legislature in directing that the only statute which should be used was the highway statute and not the railroad laws.

The appellant has contended that the classification, if allowed to stand, will result in an inequality of result when his land is taken, as compared with a taking for the same purpose by a railroad. In making this contention the appellant has not taken into consideration the fact that the very reason for classification is to legalize and make proper the infliction of inequality upon those in the different classes.

> "It has been said that it is of the essence of a classification that on one class are cast duties and burdens different from those resting on the general public, and that the very idea of classification is that of inequality, *so that the mere fact of inequality in no manner determines the matter of constitutionality.*"
>
> 6 R. C. L. 374.

The appellant, ignoring this fundamental, has argued in substance that whenever property is taken which ultimately is to be devoted to some particular physical use, the lowest measure of the statutory proceeding for the taking of that property, regardless of the character of the condemning agency, is the statute that is most favorable from the standpoint of the amount to be paid as damages. *In other words, appellant contends that whenever property is taken for railroad purposes, there will always be a denial of the equal protection of the laws, if the statute under which their property is taken affords him less than the most favorable railroad condemnation statute to be found anywhere on the books.* The appellant argues that because the statute which a railroad would use, (if the taking were directly by a railroad for private use) would afford him in dollars and cents more than he believes he can obtain when the State

condemns under a different statute, and because part of this monetary difference will be caused by the fact that a jury can be obtained in one case and not in the other, he is being denied the equal protection of the laws. When reduced to these terms it will be obvious that this is not an inequality in the constitutional sense.

2. *A classification in eminent domain cases is based on the character of the agency seeking to take the property.*

The basis upon which classifications have been established has usually been determined by the character of the party seeking to exercise the power. The legislature has been accorded a great deal of latitude in making these classifications. In Corpus Juris we find it said—

> "In the absence of a constitutional provision on the subject, the mode of exercising the right of eminent domain is within the discretion of the legislature, untrammeled by any limitation except that the purpose is a public one, and that just compensation be paid or tendered to the owner of the property taken, and the power to prescribe rules of procedure may be delegated. * * * The procedure by which property is to be condemned and compensation assessed is not ordinarily prescribed by constitutional provisions. This matter is usually left to the discretion of the legislature. Accordingly, in probably all jurisdictions, general statutes have been enacted which provide a mode of procedure to be followed in condemnation and assessment cases generally, and which are commonly referred to as the eminent domain acts. *In addition to these acts, general statutes have been adopted prescribing a special procedure applicable to particular classes of cases, the classification being based either on the nature of the pur-*

pose for which the property is sought to be taken or on the character of the party seeking to take it. Thus, a special procedure is commonly provided where property is sought to be taken for the purpose of a street or highway; a park; a drain, levee, or sewer; a canal or water way; a wharf or dock; irrigation or water supply; a dam; a railroad; a turnpike or toll road; a telegraph or telephone line; or electric light and power supply; *which enumeration of purposes involves the classification, just alluded to, based on the character of the party seeking condemnation, as where petitioner is a state or a state officer or board; a city, county, or town, or a municipal officer or board; a drainage levee, or irrigation district; a water works company; a railroad company; a turnpike or toll road company; a telegraph or telephone company; or an electric light and power company.* * * * In the case of municipal corporations, a mode of procedure is not uncommonly embodied in their charters; and the same is true in a measure of private corporations, especially quasi public corporations, such for instance as railroad companies. *Furthermore, a mode of procedure is not infrequently provided by special or private acts relating to individual corporations whose charters are wanting in that respect.*

20 C. J. 874.

Speaking on this same general subject, Lewis on Eminent Domain has this to say with regard to how the authority may be given:

> "This is purely a matter of legislative discretion, unless limited by the constitution. The authority may be given by a special act to a particular person or corporation, or by a general act or general incorporation laws."

Lewis on Eminent Domain, (3rd ed.) Vol. 1, p. 683.

Not only may this right be conferred in most any manner the sovereign sees fit, so long as due process is observed, but it may likewise have two or more valid acts in force at one and the same time conferring the power upon a single municipality.

> "*There may be two complete acts in reference to the same subject matter, such as the construction of gravel roads, the acquisition of parks, etc., though having inconsistent provisions, under either of which proceedings may be had,* if the legislature expressly declares in the second that it was not their intention to repeal any former act on the subject. So a corporation may have the option of proceeding under its special charter or under the general law."
>
> Lewis on Eminent Domain, (3rd ed.) Vol. 1, p. 698.

In other words, there is a sufficient basis for classification when there is nothing more than a difference in the character of the party seeking to exercise the power of eminent domain. *If a property is to be taken for railroad purposes by a railroad on the one hand and to be taken for precisely the same purpose by a state on the other hand, two separate and distinct rules of procedure may be laid down without violating the equal protection clause of the constitution, so long as just compensation is paid.*

The power of the State to classify railroads and to extend different remedies to different classes is beyond questioning. There need be only some possible state of facts to justify the drawing of a line and the application of different rules to the different classes. (6 R. C. L. 385.) The authority may be given by a special act to a particular person. (Lewis on Eminent Domain (3rd ed.)

Vol. 1, p. 683.) We have pointed out to the court any number of reasons why the special circumstances of this case warranted the application of a special procedure. Remembering the general rule that "*if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed,*" (6 R. C. L. 385) this court need only look to the great difficulties to be encountered in establishing a new line through twenty-eight restricted subdivisions, crossing a great number of important state and county highways where special grade separations would be required, *and to recall that this is not a building of a new railroad but the relocation of an old one.* It is certainly a vastly different thing to relocate a line already established, than to merely lay out a new railroad. Many different problems will arise from the abandonment of the old and establishment of the new line that could not be present where only a new line is to be built. Many people will have the line simply moved from one place on their property to another. Others who now are served by the old line will find themselves without it when the change is made. The inherently difficult problem that Mr. Chief Justice Taft remarked in the Brown case—the utter impossibility of saying just how much the businesses and things in the old town were worth—is likewise present in our case. How much is a nine mile piece taken out of the heart of a railroad system worth?

The granting of a special statute to union depot companies is justified either on the ground that the paramount power to prescribe the methods is not hedged about by the plaintiffs' objection or on the ground that the slight difference in the precise railroad use warrants it or because there is a difference in the character of the condemning agency. If the building of a union

depot is enough different from building an ordinary depot to justify the use of two different statutes, the difference between building a new railroad and in relocating an old one is more than ample to sustain the classification in our case. In addition, there are all those other differences we have just named. (See Backus v. Fort Union Depot, 169 U. S. 557.)

The Michigan Supreme Coourt has pointed out that there are many conditions named in the railroad statute that cannot be met by the highway commissioner. The very language of that statute renders it impossible for him to use it. (See Fitzsimmons & Galvin, Inc. v. Rogers, supra.)

F. *The provisions of the highway condemnation statute and railway condemnation statute have been found by our State Supreme Court to be substantially identical.*

The ground upon which this appellant relies is that the two statutes are clearly different and that the use of the highway condemnation statute deprive him of both precedural and substantive rights. At one point in his brief he contends that the two statutes "allow different measures of damages to be paid to the property owners for the property taken and damaged". In elaboration of this claim he contends that he is deprived of his right to consequential damages and will have benefits offset. We are unable to understand his claim that he will be deprived of consequential damages. The state has consistently maintained from the beginning that he is entitled to any consequential damage to the remainder of his property demonstrated by the proof, and the state

not only was committed to that proposition when before the courts, but have likewise conceded that point before the Commissioners who are even now, at the time this brief is being prepared, hearing testimony with regard to the damages suffered by this appellant. In a case decided in September, 1929, our Supreme Court, in defining the rule obtaining in this state with regard to the measure of damages where part of a parcel of land is taken by eminent domain, said—

> "Where only part of a parcel is taken, just compensation is to be determined by the amount which the value of the parcel from which it is taken is diminished. The value of the part actually taken is allowed as direct compensation, but the decreased value of the residue of parcel on account of the use made of the land taken, is also allowable as compensation. Port Huron, etc., R. Co. v. Voorheis, supra; *Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649; Johnstone v. Ry. Co., 245 Mich. 65.*"

In Re: Widening of Bagley Avenue, 248 Mich. 1.

It will be noticed that in laying down this rule our Court has cited in support of its statement the two cases having to do with the highway project involved in this present proceeding.

The same rule is enunciated and made clear in another case decided at the same time the Bagley Avenue case was handed down. In this last case the court quoted with approval from the cases of Fitzsimmons & Galvin, Inc. v. Rogers, and Johnstone v. D. G. H. & M. Ry. Co., supra, and among the other citations, sets forth a citation from 20 Corpus Juris, 730:

"The measure of damages is the injury done to the fair market value of the entire tract by the taking of only a part. In other words, the owner is entitled to recover the difference between the market value of the entire tract before the taking and the market value of what is left after the taking."

In Re Widening of Fulton Street, 248 Mich. 13.

The Michigan Supreme Court has ruled that, except as to inconsequential matters of procedure, there is no distinction or difference of any importance between the two condemnation statutes in question. *In the case of Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649, the court compared the terms of the two statutes at great length and pointed out that the same result would be reached regardless of which statute might be employed to condemn the property.* We shall not burden the court with a citation of all those parts of the court's opinion wherein it disposes of the arguments having to do with the claimed differences between the two statutes. In considering the objection that the use of the highway statutes deprive the appellant of the claimed right of a trial by jury, the court said—

"It is true that the railroad act (chap. 157 2 Comp. Laws 1915) affords a jury trial but it does not follow that the legislature may not provide a proper procedure without trial by jury. The present undertaking is a State project and as such clearly falls within the exception found in the State Constitution as to the right of a jury trial. The constitutional provision is as follows:

" 'When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders

residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law: Provided, That the foregoing provision shall not be construed to apply to the action of commissioners of highways or road commissioners in the official discharge of their duties.' Art. 13, Sec. 2.

"'In the absence of a special constitutional or statutory provision there is no right to trial by jury in condemnation proceedings. Due process of law does not require the damages in such proceedings to be assessed by a jury.' 20 Cyc. p. 999.

"The highway act under which the commissioner is here proceeding provides for a determination of necessity by a hearing before the State highway commissioner, and for an assessment of damages by three court commissioners. Act No. 352, Pub. Acts 1925, Sec. 7. This, we think, fully protects the plaintiff's constitutional rights."

Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649.

In considering the claim that the measure of damages would not be the same, the court said:

"4. The plaintiff strenuously insists that it will be unable to recover full compensation for damage to its property if it is taken for railroad purposes under the highway act because the measure of damage provided in the highway law is less than that specified in chapter 157, 2 Comp. Laws 1915, which contains the general provision for condemnation of railroad rights of way. That one legislative act may contain a different provision than is found in another as to the measure of damages is not controlling. The test is whether the provision in the act falls short of the constitutional requirement for just compensation. *A comparison of the provisions of these two acts relative to the damages to be awarded dis-*

closes a close similarity with the exception of the provisions for payment of costs and an attorney fee required by the railroad act. The provision in the latter act as to damages (2 Comp. Laws 1915, sec. 8255) is that the commissioners (or jury) 'shall ascertain and determine the damages or compensation which ought justly to be made.' The highway law provision (Act No. 352, Pub. Acts 1925, Sec. 16) is:—'The court commissioners shall appraise the damages to be paid as compensation,' etc. It is true that the highway law of this State provides that in fixing compensation the benefits accruing to the property owner are offset against the damage awarded. See Act No. 352, Pub. Acts 1925, Sec. 18; In re Macomb County Board of County Road Com'rs, 242 Mich. 239. *But it does not follow from this that in a proceeding wherein the State highway commissioner is seeking to secure a right of way, the damage to be awarded the porperty owner will be anything short of the 'just compensation' provided in section 2 of art. 13 of the Constitution. In the present case, as in an ordinary proceeding for condemning a right of way for a railroad, it will be the duty of the commissioners to compensate the owner for what his landed interest will suffer from the use proposed to be made of it by the railroad company.* Barnes v. Railway Co., 65 Mich. 251. Adequate compensation is such only as puts the injured party in as good condition as he would have been in if the injury had not been inflicted. It includes the value of the land, or the amount of which the value of the property from which it is taken is depreciated. Grand Rapids, etc., R. Co. v. Heisel, 47 Mich. 393. There is no provision in our statutes for offsetting benefits for a railroad right of way; and in the absence of an express statutory provision such a deduction cannot be made. Detroit, etc., R. Co. v. National Bank, 196 Mich. 660; State Highway Commissioner v. Breisacher, 231 Mich. 317. With this construction placed upon the highway act, it is not subject to the objection that it fails to provide adequate

compensation for the property owner and is therefore unconstitutional. Nor does it leave force to plaintiff's contention that since it is here sought to condemn a railroad right of way the procedure must be under and in accordance with the general railroad act rather than under the highway law."

V.

THE PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW.

The State at the time this brief is being written is conducting hearings before the Michigan statutory commission for the purpose of fixing the damages to the appellant's property. It is entirely possible that by the date of the argument of this case the proofs may have been completed and the case submitted to the commissioners. The appellant has presented to the commissioners precisely the same objections presented to this court in the present case. All of these objections can and will undoubtedly be reviewed by our State Supreme Court in the event the appellant is dissatisfied with the finding made by the commissioners. We stress this point because it establishes our contention that all of the objections that appellant raises can and should be presented at law and not raised in an equity court for the purpose of obstructing the carrying forward of this most important State highway project.

The State has succeeded in purchasing all of the property needed for the relocation project, except the appellant's property, the property of his brother immediately adjoining it (and who was a party plaintiff in an action instituted at the same time and heard along with this

case in the lower court), another parcel belonging to the same family as *cestius que trust* and three other small parcels.

The questions raised by the appellant are in essence simply objections to the rules of procedure which the appellant complains *may* be followed in assessing his damages. These objections can and properly should be raised in the condemnation proceeding itself. If the State *should* apply the wrong rule certainly this appellant has recourse upon appeal to our State Supreme Court, and that tribunal will undoubtedly compel the State Highway Commissioner to follow the correct rule of law. Thus far in the proceeding the State has made no attempt to ask the commissioners to consider any *benefits* that may accrue to the appellant's property, and the State has been offering proof without any reference to such benefits.

If the statutory method being pursued is entirely incorrect, then the appellant, upon pursuing his objections already made by him in the condemnation case, will be able to reverse the commissioners' determination and compel the State to commence anew. *Even if he should be successful in all his contentions, he could not prevent entirely the construction of this project. The State is certainly entitled to proceed under one statute or the other and the problems involved have simply to do with matters of procedure in arriving at the damages to be awarded.* The continued use and occupation of the property will, therefore, not change his legal position in the slightest, nor will it deprive him of any additional thing of value. He should be remitted to his remedy at law and compelled to pursue that remedy until or unless it de-

velops that the State is actually depriving him of his constitutional rights.

CONCLUSION.

The special statutory tribunal from whose findings the appellant appeals gave careful consideration to all the objections now raised and was unanimous in rejecting them all. It spent several months analyzing the objections and unanimously decided that the constitutional rights of this appellant were not being violated. The majority of that tribunal adopted the State's contention that the appellant's property was being acquired for a highway project. While this seems to us to be the correct ground upon which to arrive at the result, the reasoning advanced by the third member of that court is just as sound and conclusive as the one relied upon by the majority. The classification is based upon substantial grounds. The State has advanced both lines of reasoning, although it prefers to rest its case upon the argument that this property is being taken for a highway project.

The State is proceeding in an orderly manner in acquiring this appellant's property. It is now engaged in presenting proofs on the questions of damages before the commissioners duly appointed for that purpose. The special statutory tribunal has unanimously held that we are preserving the appellant's constitutional rights in so doing. The appellant's objections have to do solely with questions of procedure which have been raised before the tribunal now engaged in the task of fixing his damages. The appellant has his remedy at law and is now being accorded his day in court. Delay in the completion of this highway project will not afford the appel-

lant any protection he does not now possess. The unanimous action of the statutory court in rejecting the plaintiff's objections should not be disturbed, and we, therefore, respectfully urge upon the court that it dismiss this repeal and remit the appellant to his remedy under the State statute now being employed.

Respectfully submitted,

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Attorneys for Defendant and
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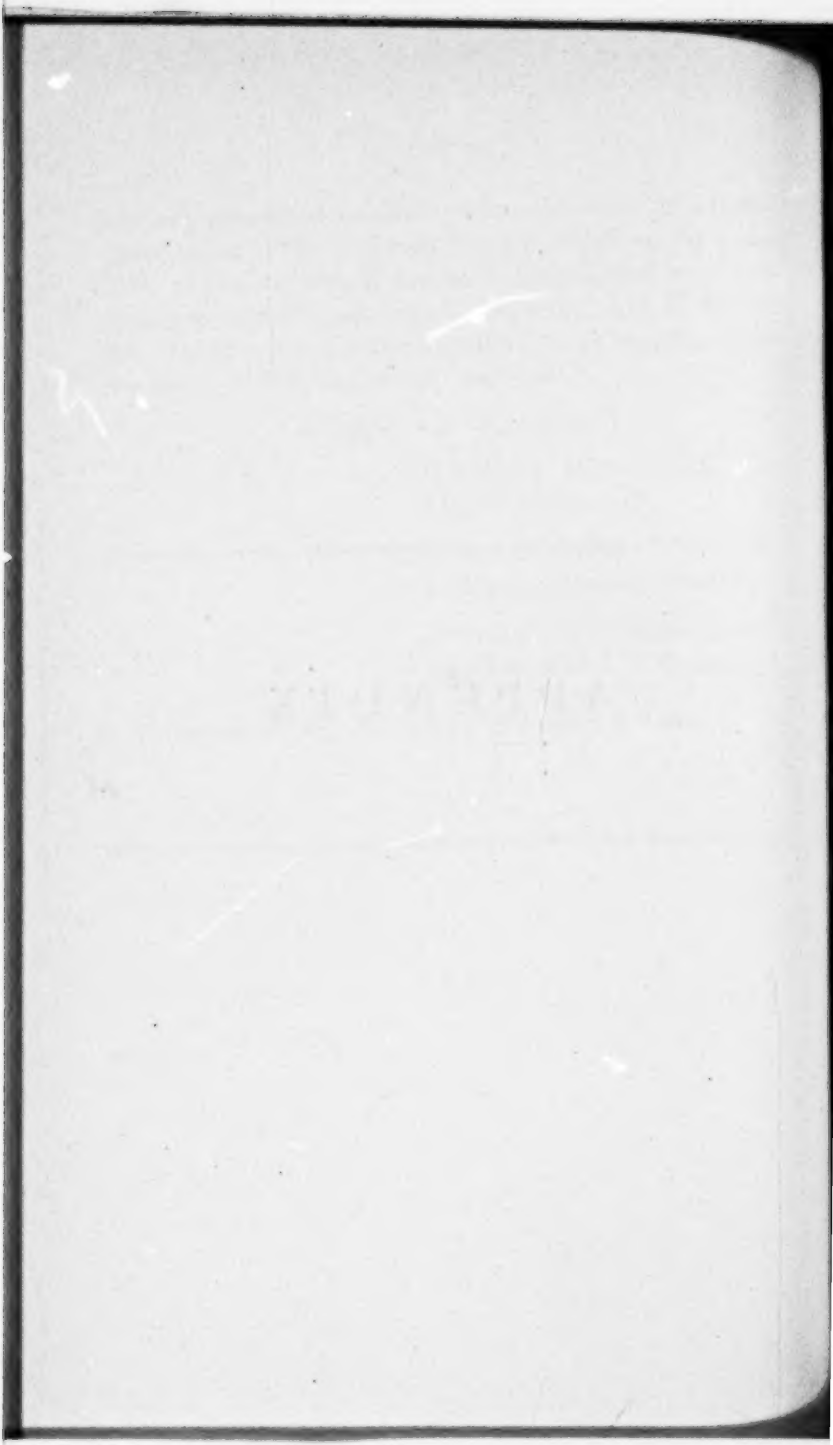
Dated at Lansing, Michigan, February 6, 1930.

APPENDIX



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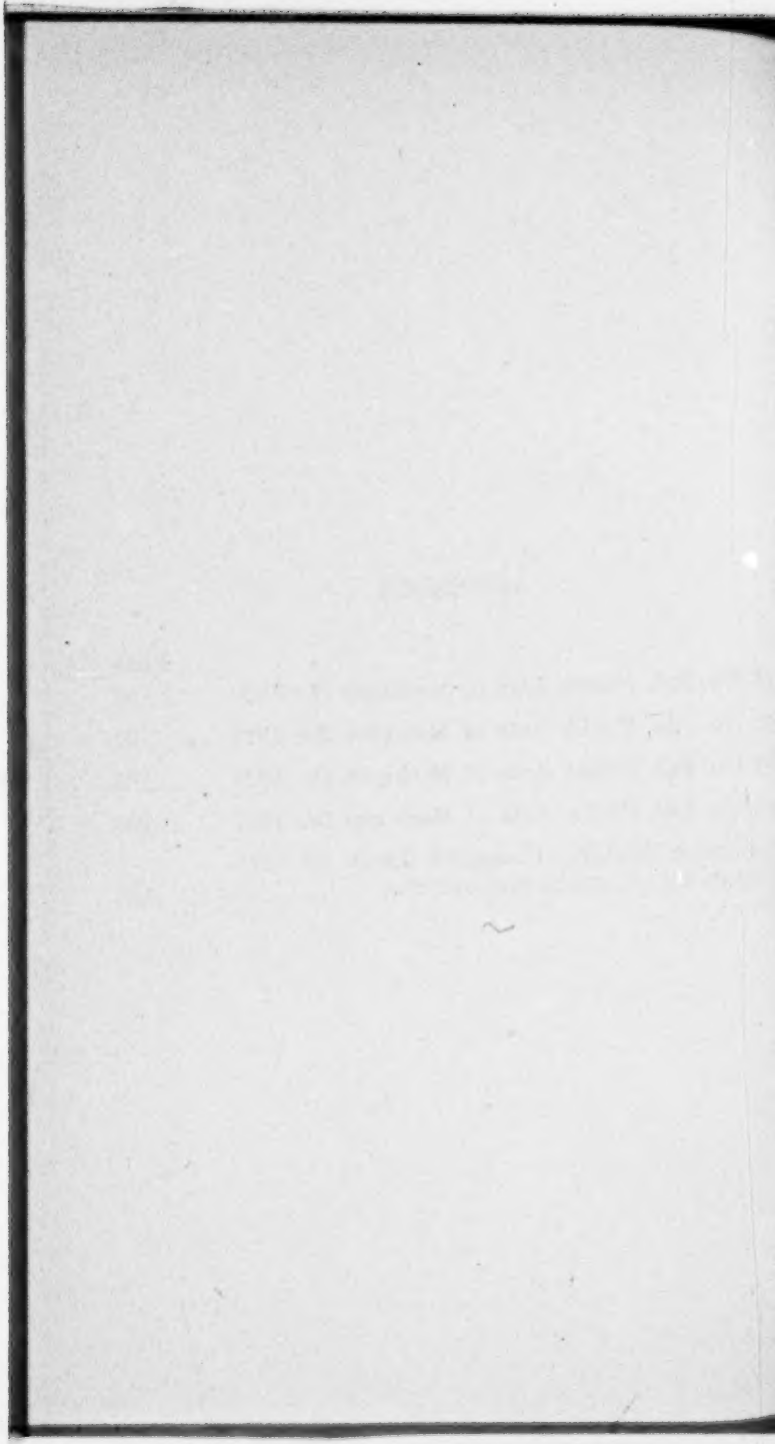


HIGHWAY CONDEMNATION STATUTES

Act No. 352 of 1925

AN ACT to provide for the purchase and condemnation of private property for public highway purposes.

The People of the State of Michigan enact:

SECTION 1. Township highway commissioners, by and with the approval of their respective township boards. boards of county road commissioners, and the state highway commissioner are each hereby authorized and empowered to secure by gift or purchase from the owners thereof:

(a) Property for the right of way for any road to be laid out, altered, or widened, or for changing the line thereof;

(b) Gravel, rock, sand, dirt and any and all other materials that may be needed for the proper construction, improvement or maintenance of a road;

(c) Property deemed by the commissioner or commissioners to be necessary to give to persons using a road a clear view of approaching persons and vehicles, cars, trains and other instruments of travel, at any intersection of a road with another road or with a railroad or railway track;

(d) Property deemed by the commissioner or commissioners to be necessary to change the channel of any water course, natural or artificial, in order to maintain a proper alignment of any road without crossing such water course and the riparian rights of any person, firm or corporation in or pertaining to any such water course;

(e) The fee or any lesser estate in land abutting on any highway right of way and deemed by the commissioner or commissioners to be necessary for the storage of road machinery, equipment or materials;

(f) Any and all other property and property rights deemed by the commissioner or commissioners having

jurisdiction over a road to be necessary for the proper construction, improvement or maintenance thereof.

SEC. 2. Property for a township road shall be secured by the township highway commissioner and shall be taken in the name of the township. Property for a county road shall be secured by the board of county road commissioners and shall be taken in the name of the county. Property for a trunk line highway shall be secured by the state highway commissioner and shall be taken in the name of the state. Property for right of way shall be acquired by a release duly executed by the owner or owners of the lands and acknowledged and witnessed in the manner provided by law for the acknowledging and witnessing of deeds. All such releases shall be recorded in the office of the register of deeds of the county in which the land is situated.

SEC. 3. Property for road purposes shall be paid for by the commissioner or commissioners out of any funds under their control, appropriated for that purpose.

SEC. 4. Whenever the commissioner or commissioners shall be unable to agree with any person interested in any such property for the purchase thereof, or whenever such person shall be unknown or a non-resident of the county, or a minor or an insane or incompetent person, the commissioner or commissioners may make a written determination of the necessity of the particular road construction, improvement or maintenance project for which such property is desired, the necessity for taking the particular property described and the damages which, in the opinion of the commissioner or commissioners, should be paid as compensation for the taking of each parcel of such property. Such determination shall also describe the property desired and shall give the name of each person interested therein, so far as known to the commissioner or commissioners making the determination. The declaration of the commissioner or commissioners that he or they have been unable to agree with the owner, or owners, for the purchase of such property and his or their determination of the necessity of the project and of taking the particular property described therefor, shall not thereafter be ques-

tioned: *Provided*, That no such determination shall be made by any township highway commissioner except after a hearing, of which written notice shall be given to each person interested in the property desired, at least seven days before the time of hearing, such notice to be served either personally, or by leaving a copy at the residence of the person or persons interested, or in the case of non-residents, by posting copies thereof in five conspicuous places in the township, one of which shall be on the property, and by mailing a copy thereof by registered mail addressed to the last known post-office address of each such non-resident person or persons: And *provided further*, That any person feeling himself aggrieved by any such determination of a township highway commissioner may, within five days after such determination, appeal therefrom to the township board in the manner that appeals are or may be taken from determinations of township highway commissioners relative to laying out a new road; and when any such appeal shall be taken the determination of the township highway commissioner shall not be of any force or effect unless and until the same be confirmed by the township board on such appeal.

SEC. 5. Such determination shall be filed with the township clerk if it be with reference to a township road, with the county clerk if with reference to a county road, and in the office of the state highway commissioner if with reference to a state trunk line highway, and a certified copy thereof shall be recorded in the office of the register of deeds of the county in which the property is situated. Compensation for the taking of the property therein described shall be paid or tendered to the owner thereof if known and residing in the county in which the land is situated, and if such tender be not accepted or the owner shall be unknown, or a non-resident of the county, by depositing the amount thereof with the township, county or state treasurer, as the case may be, the amount therein determined as the damages to be paid as such compensation, the same to be paid to the person or persons entitled thereto upon the execution or delivery of the proper release or releases or subject

to the order of the court in case of an award of damages by court commissioners as hereinafter provided.

SEC. 6. Upon the filing of such determination and proof of payment or deposit as above provided, the commissioner or commissioners having the matter in charge shall give notice thereof to the owners or occupants of the property therein described, which notice shall state that the said commissioner or commissioners are about to take possession of said property for the public highway purposes in said determination stated, and may also contain a notice to the owners or occupants of such property to remove their fence or fences and other obstructions and encroachments within thirty days thereafter. Upon the filing of such determination and the giving of such notice, as aforesaid, the title, and the right of possession to all of the property and property rights described in the determination shall vest in the township, county or state, as the case may be, for the purpose or purposes therein stated, and in case the owners or occupants thereof shall neglect or refuse to remove their fence, fences and other obstructions and encroachments within thirty days, the commissioner or commissioners shall have full power, and it shall be their duty to enter upon the premises with such aid and assistance as shall be necessary and remove such fence or fences, obstructions or encroachments without delay: *Provided,* That no person interested as owner, or otherwise, in any of the property described in such determination, shall be required to vacate or move any dwelling house or other building until after the damages to be paid as compensation, for the taking of such property, have been determined and paid or tendered.

SEC. 7. Within ninety days after the filing of any such determination, as aforesaid, the commissioner or commissioners having the matter in charge, unless they have been able to agree with the owners of the property therein described on the damages to be paid as compensation for such taking, shall file with the circuit court or probate court of the county in which such property is situated a petition, describing the road improvement for which the property is being taken, reciting that the said

commissioner or commissioners have made and filed the determination as hereinabove provided, and that he or they have taken, or are about to take, possession of the property described in said determination, for public highway purposes, describing the property for the taking of which he or they have been unable to agree with the owners on the damages to be paid as compensation, stating whether it is deemed necessary to take the fee of said property, so far as known to the commissioner or commissioners, or an easement therein, or the fee of part and an easement in part, giving the name of each person interested in each such piece or parcel of property, and praying for the appointment of three court commissioners to appraise the damages to be paid as compensation for the taking of each such piece or parcel of property for such road purposes.

SEC. 8. Upon the filing of the petition, the court shall make an order fixing a day for the hearing on such petition, which shall be not less than three weeks thereafter. Such order shall recite the names of the persons mentioned in the petition and the descriptions of each piece or parcel of property and shall state the purpose of the petition. A copy of such order shall be served, at least ten days before the day of hearing, upon each person named therein as being interested in the property to be taken, who is a resident of the county in which the property is located, and also upon the person or persons in possession of such property if it is in the possession of any person or persons other than the owner. Such service may be made personally or by leaving at the place of residence of the person to be served. Service may also be made upon persons interested in the property who are non-residents of the county.

SEC. 9. In cases where a minor or an insane or incompetent person has an interest in such property, service of a copy of the order shall be made upon the guardian, if any, and if such person has no guardian, the commissioner or commissioners may petition the court for the appointment of a guardian ad litem. Upon the filing of such petition the court shall appoint a guardian ad litem, who shall be a resident of the county and upon whom

service of a copy of the said order shall be made.

SEC. 10. Upon, or at any time after, the filing of such petition, the circuit judge, or the probate judge, as the case may be, shall make an order for the appearance of any person or persons interested in the property, or any part thereof on or before the day of hearing therein stated, upon proof by affidavit of any of the following facts:

1. That such person resides out of or is absent from the county, or his whereabouts unknown;

2. That it cannot be ascertained in what county, state or country such person resides.

SEC. 11. Such order shall be published once in each week for three successive weeks, in some newspaper published and circulated in the county, or in such other paper as the court may direct, and a copy of such order shall be mailed to each absent or non-resident person at his last known postoffice address, by registered mail, and a return receipt demanded. Proof by affidavit shall be made of such mailing, and whether or not a return receipt was received, and if one was received, it shall be attached to said affidavit; but such publication and mailing shall not be necessary in any case in which a copy of such order has been served on each such absent or non-resident person.

SEC. 12. Proof of publication and service may be made by affidavit of any person or persons having knowledge of the facts. Such proof shall be filed with the court on or before the day of hearing, and thereupon the court shall have jurisdiction of the subject matter involved in the proceedings and of the parties interested therein.

SEC. 13. On the day fixed as aforesaid, the court shall enter the default of all persons interested in the property described who have not appeared, and shall direct the payment to such persons of the sum or sums stated in the determination aforesaid, as compensation for the taking of the pieces or parcels of property in which they are interested; and the court shall also, unless sufficient cause to the contrary be shown, appoint three disinterested persons commissioners, herein called court com-

missioners, whose duty it shall be to appraise the damages to be paid as compensation for the taking of the property described in the petition, in respect to which an appearance is made, for public highway purposes. Said commissioners shall not be residents of the township in which the property sought to be taken is situated. The court shall fix the time and place for the first meeting of such court commissioners, and require their attendance; it may also authorize the court commissioners to adjourn their meeting from time to time not later than to a day to be named, and shall fix the time for filing their report.

SEC. 14. The court commissioners shall meet at the time and place ordered by the court and shall be sworn faithfully to discharge their duties. If all do not then appear, a less number may adjourn to a time certain, but no adjournment shall be made to a day later than the time allowed by the court. All adjournments shall be publicly announced. The court or the clerk thereof may issue writs of subpoena to compel the attendance of witnesses before the court or before the said court commissioners. Either one of such court commissioners may administer oaths to witnesses.

SEC. 15. The court commisisoners, at the time fixed by the court or at the time fixed by adjournment, shall view the premises described in the petition and shall hear the proofs and allegations of the parties. At such hearing the determination hereinabove provided for, or a certified copy thereof, shall be read in evidence before said court commissioners and shall be prima facie evidence of the ownership of the property therein described.

SEC. 16. The court commissioners shall appraise the damages to be paid as compensation to each person interested in each such piece or parcel of property, and shall report such decision in writing, signed by them or a majority of them, at or before the time fixed for that purpose, but it shall not be necessary for said court commissioners to report on all of such property at one time.

SEC. 17. It shall not be necessary for the commissioner or commissioners to include in one determination

the descriptions of all of the property necessary to be taken for any single project, or to include in one petition, the descriptions of all of the property described in the determination upon which such petition is based.

SEC. 18. If any discontinued highway shall be upon lands through which a new highway shall be laid out, the same may be taken into consideration in estimating the damages sustained by the owner of such lands; and in like manner the benefits accruing to owners of lands by reason of laying out, altering, widening or otherwise improving any highway or of changing the line thereof, shall be taken into consideration in determining the damages to be paid to any such owner as compensation for the taking of any of his property for any such highway purpose. In each such case, the commissioner or commissioners having the matter in charge, or the court commissioners, as the case may be, shall state such fact and the amount deducted on account thereof in the determination, or report, as the case may be; and should any special assessment be thereafter made upon such lands on account of such improvement, the owner or owners thereof shall be credited on such special assessment with the sums so deducted for benefits as aforesaid. In like manner, the court commissioners, in considering benefits, shall give to owners of lands already specially assessed on account of the improvement for which the property is being taken, credit to the amount of such special assessment, as against any allowance for benefits, in their determination of damages to be paid as compensation for such taking.

SEC. 19. The court may, at the time of the filing of the report or at such other time to which it may adjourn the proceedings, on cause shown, set aside the report and refer it back to such court commissioners or appoint other commissioners to re-try the questions involved, whereupon such proceedings shall be had as are hereinbefore provided for. The court may permit the amendment of any determination, petition, affidavit, order, report or proceeding filed or had in the premises in such manner as shall be just and proper; it may fill any vacancy that shall occur among the court commissioners,

by reason of death, resignation, removal or inability to act; it may at any time, in its discretion, remove any or all of said commissioners and fill the vacancy or vacancies thereby created; it may permit a defective proceeding to be set aside and other proceedings in compliance with law to be had in place thereof; it may adjourn such proceedings or any part thereof from time to time, and may make all such orders in the premises as may be just and proper to further and accomplish the purpose thereof.

SEC. 20. After the court shall confirm the report of the court commissioners, it shall enter an order authorizing the commissioner or commissioners to pay the several sums awarded for damages, and they shall pay the same accordingly. Such payment shall be made in money or by an order drawn on the proper township, county or state treasurer, to the several persons entitled thereto, and if refused, or if there be no person properly authorized to receive the same, or if the person entitled thereto is a non-resident of the county or cannot be found, it shall be deposited as directed by the court.

SEC. 21. The court shall fix the compensation of the court commissioners, not to exceed ten dollars per day, and determine the amount of necessary expenses incurred in connection with such proceedings, and the whole cost thereof.

SEC. 22. Any certificate, report or determination authorized or required by this chapter, or the record thereof, or a certified copy of any such certificate, report, determination or record, shall be prima facie evidence of the facts recited therein and of the title to the property therein described or referred to in the township, county or state, as the case may be, and of the right of the commissioners to take the same for public highway purposes.

SEC. 23. The provisions of this chapter shall be deemed to extend to and include the right to acquire and take property and property rights held, reserved, owned, used or occupied by any cemetery association or municipality, or by any person, firm, society, association or corporation for cemetery or municipal purposes; to acquire

and take property desired by the commissioner or commissioners to exchange for other property which in his or their opinion it is necessary to acquire for public highway purposes, whenever he or they have agreed in writing with the owner or owners of such property for such exchange; and to acquire and take the fee to the whole of a particular lot or parcel of land whenever the portion thereof that is actually needed is such a proportion of the whole as to, in the opinion of the commissioner or commisisoners, practically destroy the value of what would be left as a single lot or parcel of land.

SEC. 24. Whenever the whole of a lot or parcel of land is, or has been, taken by any commissioner or commissioners, as provided in the preceding section, such commissioner or commissioners, or his or their successor or successors in office shall have the right, and are hereby authorized, to sell the portion not needed, on whatever terms such commissioner or commissioners may deem proper.

SEC. 25. If any proceeding to condemn property for highway purposes be pending at the time this act takes effect, the same shall not abate or be discontinued by reason of this act, but the commissioner or commissioners having the matter in charge, may, if the proceeding be one for which the provisions of this act are applicable, prepare, file and serve a determination as hereinabove provided for, and thereupon such commissioner or commissioners may take possession of the property as herein provided, and such proceeding shall be continued as though commenced under this act in the first instance, both as to the procedure to be taken and as to the determination of damages to be paid as compensation for the taking of the property for public highway purposes.

SEC. 26. Should any section or part of a section of this act be held to be invalid for any reason, such invalidity shall not be held to impair or invalidate the remainder of this act, or any part of it, it being the legislative intent that every section and part hereof shall stand and be in force and effect notwithstanding the invalidity of any particular provision or provisions.

SEC. 27. Any proceeding taken under the provisions

of this act shall be subject to review upon certiorari. The procedure therefor shall be the same as is required in case of certiorari to review judgments rendered by judges of the circuit courts: *Provided*, That the application for certiorari must be filed within twenty days after the report of the court commissioners shall have been confirmed.

This act is ordered to take immediate effect.

Approved May 27, 1925.

Act No. 92 of 1927

AN ACT to amend sections one, two, three, four, six, eight, eleven, twenty-three and twenty-seven of act number three hundred fifty-two of the public acts of nineteen hundred twenty-five, entitled "An act to provide for the purchase and condemnation of private property for public highway purposes," approved May twenty-seventh, nineteen hundred twenty-five, and to add thereto a new section to stand as section twenty-eight.

The People of the State of Michigan enact:

SECTION 1. Sections one, two, three, four, six, eight, eleven, twenty-three and twenty-seven of act number three hundred fifty-two of the public acts of nineteen hundred twenty-five, entitled "An act to provide for the purchase and condemnation of private property for public highway purposes", approved May twenty-seventh, nineteen hundred twenty-five, are hereby amended, and a new section is hereby added to stand as section twenty-eight, said amended and added sections to read as follows:

SEC. 1. Township highway commissioners, by and with the approval of their respective township boards, boards of county road commissioners, and the state highway commissioner are hereby authorized and empowered to secure by gift or purchase from the owners thereof:

(a) Property for the right of way for any road to be laid out, altered, or widened, or for changing the line thereof;

(b) Gravel, rock, sand, dirt and any and all other materials that may be needed for the proper construction, improvement or maintenance of a road;

(c) Property deemed by the commissioner or commissioners to be necessary to give to persons using a road a clear view of approaching persons and vehicles, cars, trains and other instruments of travel, at any intersection of a road with another road or with a railroad or railway track;

(d) Property deemed by the commissioner or commissioners to be necessary to change the channel of any water course, natural or artificial, in order to maintain a proper alignment of any road without crossing such water course and the riparian rights of any person, firm or corporation in or pertaining to any such water course;

(e) The fee or any lesser estate in land abutting on any highway right of way and deemed by the commissioner or commissioners to be necessary for the storage of road machinery, equipment or materials;

(f) Any and all other property and property rights deemed by the commissioner or commissioners having jurisdiction over a road to be necessary for the proper construction, improvement or maintenance thereof;

(g) The state highway commissioner and boards of county road commissioners are authorized and empowered to take property and property rights under the provisions of this act within the limits of any incorporated city or village in this state: *Provided, however,* That before any proceedings are taken under this act involving the taking of any property or property rights in any city or village for the changing, altering, opening or widening of any street or highway, said street or highway shall be taken over as county road or designated as a state trunk line road or federal aid road, as the case may be, and the consent of the village or city council by resolution to so take over or designate said street or highway as a county road or state trunk line road or federal aid road shall be first obtained.

SEC. 2. Property for a township road shall be secured by the township highway commissioner and shall be taken in the name of the township. Property for a county road shall be secured by the board of county road commissioners and shall be taken in the name of the county. Property for trunk line highway purposes shall be secured by the state highway commissioner and shall be taken in the name of the state. Excepting in those cases where excess property is taken for highway purposes such property shall be taken in the name of the state highway commissioner. Property for right of way shall be acquired by a release duly executed by the owner or owners of the lands and acknowledged and witnessed in the manner provided by law for the acknowledging and witnessing of deeds. All such releases shall be recorded in the office of the register of deeds of the county in which the land is situated.

SEC. 3. Property for road purposes shall be paid for by the commissioner or commissioners out of any funds under their control, available for that purpose.

SEC. 4. Whenever the commissioner or commissioners shall be unable to agree with any person interested in any such property for the purchase thereof, or whenever such person shall be unknown or a non-resident of the county, or a minor or an insane or incompetent person, the commissioner or commissioners may make a written determination of the necessity of the particular road construction, improvement or maintenance project for which such property is desired, the necessity for taking the particular property described and the damages which, in the opinion of the commissioner or commissioners, should be paid as compensation for the taking of each parcel of such property. Such determination shall also describe the property desired and shall give the name of each person interested therein, so far as known to the commissioner or commissioners making the determination. The declaration of the commissioner or commissioners that he or they have been unable to agree with the owner, or owners, for the purchase of such property and his or their determination of the necessity of the project and of taking the particular property de-

scribed therefor, shall not thereafter be questioned: ***Provided,*** That no such determination shall be made except after a hearing, of which written notice shall be given of the time and place for such hearing to all persons interested so far as known in the property desired, at least seven days before the time of hearing, such notice to be served in any of the following ways:

(a) Personally, or

(b) By leaving a copy at the residence of the person or persons interested, or

(c) By mailing a copy thereof by registered mail addressed to the last known postoffice address of each person or persons so far as known, and by publication in some newspaper printed or circulated in the county in which such lands are located at least seven days prior to date of hearing, or

(d) In case of non-residents, by posting copies thereof in five conspicuous places in the township, one of which shall be on the property: And *provided further,* That any person feeling himself aggrieved by any determination of a township highway commissioner may, within five days after such determination, appeal therefrom to the township board in the manner that appeals are or may be taken from determinations of township highway commissioners relative to laying out a new road; and when any such appeal shall be taken the determination of the township highway commissioner shall not be of any force or effect unless and until the same be confirmed by the township board on such appeal.

SEC. 6. Upon the filing of such determination and proof of payment or deposit as above provided, the commissioner or commissioners having the matter in charge shall give notice thereof to the owners or occupants of the property therein described, which notice may be served either personally or by mailing the same to the last known postoffice address of the person or persons to be served, and shall state that the said commissioner or commissioners are about to take possession of said property for the public highway purposes in said determination stated, and may also contain a notice to the owners or occupants of such property to remove their fence or

fences and other obstructions and encroachments within ten days thereafter. Upon the filing of such determination and the giving of such notice, as aforesaid, the title, and the right of possession to all of the property and property rights described in the determination shall vest in the township, county or state, as the case may be, for the purpose or purposes therein stated, and in case the owners or occupants thereof shall neglect or refuse to remove their fence, fences and other obstructions and encroachments within ten days, the commissioner or commissioners shall have full power, and it shall be their duty to enter upon the premises with such aid and assistance as shall be necessary and remove such fence or fences, obstructions or encroachments without delay: *Provided*, That no person interested as owner, or otherwise, in any of the property described in such determination, shall be required to vacate any lands or premises or move any dwelling house or other building until after the damages to be paid as compensation, for the taking of such property, have been determined and paid or tendered.

Sec. 8. Upon the filing of the petition, the court shall make an order fixing a day for the hearing on such petition, which shall be not less than fifteen days thereafter. Such order shall recite the names of the persons mentioned in the petition and the descriptions of each piece or parcel of property and shall state the purpose of the petition. A copy of such order shall be served, at least ten days before the day of hearing, upon each person named therein as being interested in the property to be taken, who is a resident of the county in which the property is located, and also upon the person or persons in possession of such property if it is in the possession of any person or persons other than the owner. Such service may be made personally or by leaving at the place of residence of the person to be served. Service may also be made upon persons interested in the property who are non-residents of the county.

Sec. 11. Such order shall be published in some newspaper published and circulated in the county, or in such other paper as the court may direct, at least twice within

fifteen days prior to the day of hearing, and a copy of such order shall be mailed to each absent or non-resident person at his last known postoffice address, by registered mail, and a return receipt demanded. Proof by affidavit shall be made of such mailing, and whether or not a return receipt was received, and if one was received, it shall be attached to said affidavit; but such publication and mailing shall not be necessary in any case in which a copy of such order has been served on each such absent or non-resident person.

SEC. 23. The provisions of this chapter shall be deemed to extend to and include the right to acquire and take property and property rights held, reserved, owned, used or occupied by any cemetery association or municipality, or by any person, firm, society, association or corporation for cemetery or municipal purposes; to acquire and take property desired by the commissioner or commissioners to exchange for other property which in his or their opinion it is necessary to acquire for public highway purposes, whenever he or they have agreed in writing with the owner or owners of such property for such exchange; and to acquire and take the fee to the whole of a particular lot or parcel of land whenever in the opinion of the commissioner or commissioners it is advisable to provide for the proper construction, improvement or maintenance of public highways.

SEC. 27. Any proceeding taken under the provisions of this act shall be subject to review upon certiorari. The procedure therefor shall be the same as is required in case of certiorari to review judgments rendered by judges of the circuit courts: *Provided*, That the application for certiorari must be filed within twenty days after the report of the court commissioners shall have been confirmed: And *provided further*, That the determination of necessity provided in section four of this act may be reviewed by certiorari within ten days after such determination of necessity and the procedure shall be the same as review of judgments rendered by a justice of the peace, except that such certiorari may be heard by the court during term or at chambers upon five days' notice given to the opposing party.

SEC. 28. Any act or proceeding herein directed or authorized to be performed or conducted by the state highway commissioner may be done by said state highway commissioner in person, or by one of his deputies; or the state highway commissioner may generally or specifically deputize any person to hold or conduct any hearing directed by this act and said deputized person shall report his conclusions and recommendations to the state highway commissioner, who shall then make his determination thereon. Any action by such deputy, or any hearing or other proceeding conducted by him shall be deemed to be for the purpose of this act, and have the same legal force and significance as though personally performed by the said state highway commissioner.

This act is ordered to take immediate effect.

Approved April 30, 1927.

[No. 215.]

AN ACT to authorize and empower the state highway commissioner to purchase or condemn property to exchange for the right of way, or a part thereof, of railroads, and railways, when such right of way, or part thereof, is necessary to be acquired for widening, straightening, altering or otherwise improving a trunk line highway, and to make such exchange.

The People of the State of Michigan enact:

SECTION 1. Whenever the line of any railroad or railway company is upon or adjacent to the right of way of a trunk line highway and such right of way or any part thereof, is necessary to be acquired for widening, straightening, altering or otherwise improving such highway, the state highway commissioner shall be authorized to enter into negotiations with such railroad or railway company for the purchase of said right of way, or of any part thereof, and to enter into an agree-

ment with any such railroad or railway company to exchange other designated property for such right of way, or for any part thereof, whenever such other designated property shall be acquired by him; and whenever any such agreement has been entered into, the said state highway commissioner shall be authorized and he is hereby empowered to acquire such other property by purchase or condemnation, and when acquired to execute the necessary conveyances and releases thereof to such railroad or railway company for its use, and to take in exchange therefor the railroad or railway right of way or part thereof for such public highway purposes in accordance with such agreement.

SEC. 2. The procedure that is, or may be, prescribed for condemnation proceedings instituted by boards of county road commissioners or the procedure that is, or may be, provided for the condemnation by state agencies and public corporations of private property for the use or benefit of the public, is hereby expressly made applicable to any proceeding brought by the state highway Commissioner under the provisions of this act.

SEC. 3. Whenever any property shall be acquired by the state highway commissioner under and by virtue of the provisions of this act, the consideration or compensation to be paid therefor shall be paid out of the state highway fund in five equal annual installments.

This act is ordered to take immediate effect.

Approved May 6, 1925.

CONTRACT BETWEEN STATE AND RAILWAY

Act No. 340 of 1927

AN ACT to authorize the state of Michigan to contract with the Detroit, Grand Haven & Milwaukee railway company for the surrender of its special charter; for acquiring by the state of a new right of way for said railroad company of approximately nine and one-tenth miles in length in Oakland county, including lands for

station grounds and facilities at Birmingham; for the exchange of said new right of way and additional lands for said railroad company's present right of way and grounds adjacent to and in proximity to state trunk line highway number ten, known as Woodward avenue; for advancing the money to said railroad company to defray the cost and expense of grading said new right of way for a double track railroad; for the construction thereon of a single track railroad; for the connection of said new single track railroad with the present railroad tracks of said railroad company; for making grade separations; the reimbursement of the state by said railroad company for the money to be paid, laid out and expended by the stat in acquiring said new right of way and additional land for said railroad company, and for the money to be advanced by the state in the first instance to said railroad company to defray the cost and expense incurred by the state under said contract; the surrender of the special charter of said railroad company; its reincorporation under the general railroad law of the state, and the payment of taxes by it after its reincorporation; to prescribe the manner of executing said contract, to create a revolving fund to carry out the terms and conditions of said contract; to provide for the disposition of said revolving fund; and to authorize the state to acquire, as a state project, by purchase or condemnation, for highway purposes, a right of way not to exceed seventy feet in width along and adjacent and/or parallel to either or both sides of the new railroad right of way as a part of the proposed relocation and improvement, where and when deemed advantageous and/or necessary by the state administrative board.

The People of the State of Michigan enact:

SECTION 1. The governor of the state of Michigan is hereby authorized and empowered to negotiate with the Detroit, Grand Haven & Milwaukee railway company for a surrender of its special charter; its reincorporation under the general railroad laws of the state, and its tax-

ation in accordance with the general laws of this state providing for the taxation of railroad companies; to acquire or cause to be acquired by the state highway commissioner, a new right of way for said railroad company approximately nine and one-tenth miles in length, in Oakland county, Michigan. The governor, secretary of state and state highway commissioner are authorized and empowered to convey said new right of way to be acquired by the state of Michigan, on behalf of said state, to said railroad company; to make, execute and deliver proper deed or deeds of conveyance for the same in consideration of the release by said railroad company, and the transfer and conveyance by it to the state of Michigan of the right of way now occupied by said railroad company between mile post number thirteen and mile post number twenty-two and one-tenth adjacent to trunk line number ten in Oakland county as provided in the form of contract annexed hereto and made a part hereof, so that the right of way of said trunk line highway number ten, known as Woodward avenue, may be widened to a width of two hundred feet for a distance of approximately nine and one-tenth miles in accordance with said contract. The state highway commissioner is hereby authorized and empowered to acquire by purchase or condemnation, as a state project, a right of way not to exceed seventy feet in width along and adjacent and/or parallel to either or both sides of the new railroad right of way as a part of the proposed relocation and improvement where and when deemed advantageous and/or necessary by the state administrative board.

SEC. 2. In case said contract shall be successfully negotiated, then and in such case there shall be created on behalf of the state, a revolving fund into which the state administrative board or its successors in authority shall pay or cause to be paid such sum or sums of money as shall from time to time in its opinion be necessary to pay, for acquiring the new right of way and additional lands necessary to carry out said contract, and to pay said railroad company for the performance of the work and the furnishing of the materials as provided in said contract; the state administrative board is authorized

and empowered to loan to said revolving fund on the security of said contract, any such sum or sums of money as shall or may be necessary from the sinking fund created to retire state highway bonds; such loan or loans to pay interest at the rate of four and three-tenths per cent per annum. Such interest to be charged against and to be a first lien on and payable out of any moneys in the state highway fund not otherwise specifically appropriated, and shall be charged against the cost and expense of widening and improving said trunk line highway number ten, known as Woodward avenue. All payments which shall or may be made by the Detroit, Grand Haven & Milwaukee railway company under and in pursuance of said contract to reimburse the state for moneys advanced by it and paid, laid out and expended by it, or by said railroad company from moneys advanced by the state in the first instance, shall be paid into said revolving fund until all of the expenditures required to be made by the state and the state highway commissioner in the first instance under said contract shall have been made, and the obligations thereby created shall have been paid, and all loans to said revolving funds or moneys from the highway bond sinking fund shall have been fully paid.

SEC. 3. When the moneys which shall have been advanced in the first instance by the state in pursuance of said contract to said railroad company, and all moneys expended by the state or the state highway commissioner for which the state or the state highway commissioner is to be reimbursed by said railroad company under the terms of said contract, through said revolving fund shall have been fully paid by said railroad company to the state in accordance with the terms and conditions of said contract, then such moneys shall be retransferred by the state administrative board, or its successor in authority, from said revolving fund to be created, to the funds belonging to the state from which the same were taken in the first instance.

SEC. 4. The changes and improvements contemplated by this act and said proposed contract, and the taking of the lands described in said contract for the new right

of way of said railroad company, including the additional lands described therein necessary for depot and yard purposes at Birmingham and all other lands necessary or required to carry out this act and said proposed contract, are hereby declared to be a public necessity, and the state highway commissioner is hereby authorized and empowered to acquire the same on behalf of the state by purchase or condemnation, in accordance with the general laws of the state of Michigan.

SEC. 5. The deed or deeds of conveyance of the new right of way for said railroad to be acquired by the state, and of such additional lands as shall be necessary to be acquired in accordance with said contract for station grounds and other purposes at Birmingham as specified in said contract, are to be conveyed by the state to said railroad company for railroad purposes; and the deed or deeds for the same shall be executed on behalf of the state by the governor and attested by the secretary of state and approved by the state highway commissioner.

SEC. 6. Said contract when made and entered into by the parties thereto and properly executed as provided therein, shall be valid and binding upon the parties thereto, their successors and assigns, conditioned however, upon the faithful performance of the terms and conditions thereof by the parties thereto.

SEC. 7. Said contract shall provide that when the terms and conditions thereof shall have been carried out, said Detroit, Grand Haven & Milwaukee railway company shall surrender its special charter, reincorporate under the general laws of the state of Michigan providing for the organization of railroad companies, and thereafter pay taxes without discrimination under the general laws of this state providing for the taxation of the property of railroad companies.

SEC. 8. Said contract shall provide that the railroad company shall repay to the state of Michigan all money advanced by the state of Michigan or the state highway commissioner in acquiring the right of way for said railroad company and in paying said railroad company, in the first instance, for doing and performing the work and in furnishing the materials contracted by it to be

performed and furnished, at the times and in the amounts and in the manner following: On the thirty-first day of December, in the year that the state shall have acquired control of the new right of way herein provided to be procured, the railroad company shall pay to the state the sum of two hundred fifty thousand dollars, and on each succeeding thirty-first day of December thereafter the further sum of two hundred fifty thousand dollars: *Provided, however,* That when the actual cost of carrying out said contract in its entirety shall have been ascertained, then the railroad company shall pay to the state a sum equal to one-fifteenth of said total actual cost, plus or minus the amount of over-payment or under-payment that shall have been made by said railroad company: And *provided further,* That said railroad company shall repay to the state all of the money paid, laid out and expended under the terms and provisions of said agreement within fifteen years after the first payment by it made, as herein provided. Said contract shall provide that no interest charge shall be made or accepted by the state on account thereof, except on past due installments, if any, and then at the rate of five per cent per annum.

SEC. 9. The governor, for and on behalf of the state of Michigan, is hereby authorized to make such modifications in said contract as shall be provided for therein and the money necessarily paid out and expended in making the changes provided for in such modifications shall, in the first instance, be advanced by the state and the state shall be reimbursed therefor by the railroad company, in accordance with the terms of said contract.

SEC. 10. The form of said proposed contract between the state of Michigan and said railroad company is as follows:

THIS CONTRACT AND AGREEMENT, made and entered into by and between THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY, party of the first part, hereinafter called the "Railway Company," and THE STATE OF MICHIGAN, party of the second part, hereinafter referred to as the "State," WITNESSETH as follows:

Whereas, The Detroit, Grand Haven and Milwaukee railway company is a corporation organized and existing under and by virtue of a special charter granted by the territorial council of the territory of Michigan, March seven, eighteen hundred thirty-four, and acts amendatory thereof and supplementary thereto, under which said statutory special charter said railway company pays annually a fixed percentage of its capital stock paid in as taxes to the state, and at the present time is paying annually twenty-five thousand one hundred seventy-one dollars and forty cents ($25,171.40); and

Whereas, The validity of said special charter of said railway company has been attacked from time to time by the state, in the courts of this state, and the validity of said special charter has been upheld by the supreme court of this state, and the supreme court of the United States; and

Whereas, The State of Michigan has for many years sought to procure the surrender of all of the special charters of all of the railroad companies in the state of Michigan, and to have said railroad companies incorporate under the general laws of the state of Michigan providing for the organization and incorporation of railroad companies and to pay the same rate of taxes to the state upon the true cash value of their taxable property, but that the said railway company has refused to surrender its special charter and to incorporate under the general railroad law, and to pay taxes upon the value of its taxable property in accordance with the general law of said state providing for the taxation of the property of railroad companies; and

Whereas, The state is desirous of acquiring the right of way of said railway company extending from the railway company's mile post number thirteen in Royal Oak to the railway company's mile post number twenty-two and one-tenth between Pontiac and Birmingham, for the purpose of enabling the state to carry out its highway program, and to widen to two hundred feet the right of way of the public highway running substantially parallel to said right of way of said railway company, and known as Woodward avenue, and to have said railway company

remove its tracks and equipment from said right of way; and

Whereas, Said railway company executed in its own behalf by its president, attested by its secretary, a contract, which said contract was submitted to the legislature of the state of Michigan for its ratification and approval, at the extra session of the legislature convened in nineteen hundred twenty-six; and

Whereas, The legislature of the state, by act number one, of the public acts of the extra session of nineteen hundred twenty-six, approved in all respects said contract, and authorized the governor and the state highway commissioner to execute the same upon the part of the state of Michigan, attested by the secretary of state; and

Whereas, After said contract was so executed on behalf of the said railway company and submitted to the legislature of the state and approved by it, and the governor and the state highway commissioner were authorized to execute the same on behalf of said state, to be attested by the secretary of state, said contract was materially changed from the terms of the contract executed by said railway company and submitted to the legislature of the state; and

Whereas, The plans and specifications attached to the contract executed on behalf of said railway company and on behalf of the state on September two, nineteen hundred twenty-six, were altered and amended subsequent to the passage by the legislature of the state and the approval by the governor, of act number one, of the public acts of the extra session of nineteen hundred twenty-six, and that by reason of the changes made in material parts of said contract after the approval of same by the legislature by act number one of the public acts of the extra session of nineteen hundred twenty-six, said contract is claimed by the state of Michigan to be of doubtful validity, although the railway company does not admit any such invalidity, said amendments, additions and alterations made in and to said contract not having been ratified by the legislature of the state, and both parties to said contract desiring to obviate, as far as possible, any question of the validity of the same which might or could

be raised on account of such modifications subsequent to its ratification and approval by the legislature of the state; and

Whereas, Said railway company and the state have entered into negotiations which have resulted in the making of a new contract and agreement and the setting aside and cancellation of the contract and agreement made and entered into on September two, nineteen hundred twenty-six, and on file in the office of the secretary of the state of the state of Michigan, subject to the ratification and approval of the same by the legislature of the state of Michigan and by the board of directors of said railway company;

Now, therefore, It is hereby agreed by and between the said railway company, party of the first part, and the state of Michigan, party of the second part, as follows:

1.

That the contract and agreement heretofore made and entered into under date of September two, nineteen hundred twenty-six, and filed in the office of the secretary of state of the state of Michigan on the third day of September, nineteen hundred twenty-six, whether valid or invalid, be and the same is hereby cancelled, set aside and held for naught, on the approval of this contract by the legislature and its execution as herein contemplated.

2.

That the state of Michigan shall, upon the ratification, approval and execution of this contract by the parties thereto, as required by law, proceed with all convenient speed to procure or cause to be procured, a new right of way one hundred feet wide for said railway company for the purpose of constructing thereon a new double track railroad, as and where provided in this contract, and the state shall, in the first instance, advance the money to defray the expense of procuring the same.

3.

Immediately after the ratification, approval and exe-

cution of this contract by the respective parties thereto as herein provided, said railway company shall, upon the new right of way being procured by the state, at once take charge of and construct with all convenient speed upon said new right of way so to be procured, a single track railroad, together with the necessary grade separations and approaches, sidetracks, switches, incidents and appurtenances, in accordance with the plans and specifications annexed to the contract made and entered into September two, nineteen hundred twenty-six, between the parties hereto and filed in the office of secretary of the state of Michigan on September three, nineteen hundred twenty-six, which plans, specifications and blueprints are made a part hereof, except as herein modified or as they shall hereafter be modified as provided herein.

4.

That said railway company, upon the completion of its railroad upon said new right of way, shall remove its railroad tracks and equipment from the old right of way now occupied by it between the points herein designated, and the state, upon the removal of said tracks and equipment of said railway company by said railway company from said right of way, may at once take possession of the same and use and improve the same, including the railway company's present right of way through Birmingham, for highway purposes, and said railway company agrees to make, execute and deliver to the state all such deeds, releases and conveyances as shall or may be deemed necessary, requisite and proper to convey the same to the state, but there shall not be conveyed to the state, by the railway company any lands between said points other than its old right of way, and such parts of other lands owned by said railway company as shall be necessary to be acquired by the state to widen said Woodward avenue to a width of two hundred (200) feet.

5.

Upon the carrying out of this contract, and the removal of said railway tracks by said railway company

from the old right of way to the new right of way, or the building of new tracks on said new right of way by the railway company, and the payment to the state of Michigan by said railway company in full for the cost and expense incurred by the state under this contract, said railway company shall forthwith surrender its special charter and any and all rights which it now has or claims to have thereunder, and incorporate under the general laws of the state providing for the incorporation of railroad companies, and transfer any and all assets of said railway company as it exists under said special charter, together with all additions to and replacements of its property, to said railway company to be incorporated under the general laws of the state providing for the incorporation of railroad companies. That said railway company shall, upon the surrender of its special charter as above set forth, thereafter be assessed for taxes in the state of Michigan, without discrimination, under the general tax laws in force in said state, from time to time, providing for the taxation of the property of railroad companies.

6.

The deed or deeds of conveyance from the persons owning the lands to be acquired by the state for the new right of way of said railway company, shall be taken in the name of the state of Michigan, and when the state shall have acquired the title to all of said right of way and said railway company shall have completed the work to be by it done under this contract, the same shall be conveyed by the state to said railway company, and the governor of the state of Michigan is hereby authorized and empowered to make, execute and deliver said deed or deeds of conveyance on behalf of the state, the same to be attested by the secretary of state of the state of Michigan, and acknowledged by them and each of them under the great seal of the state.

7.

The railroad company shall repay to the state of Michigan all money advanced by the state, or the state highway

commissioner, in acquiring the right of way for said railroad company and in paying said railroad company, in the first instance, for doing and performing the work and in furnishing the materials contracted by it to be performed and furnished at the times and in the amounts and in the manner following: On the thirty-first day of December, in the year that the state shall have acquired control of the new right of way herein provided to be procured, the railroad company shall pay to the state the sum of two hundred fifty thousand dollars, and on each succeeding thirty-first day of December thereafter the further sum of two hundred fifty thousand dollars: *Provided, however,* That when the actual cost of carrying out said contract in its entirety shall have been ascertained, then the railroad company shall pay to the state a sum equal to one-fifteenth of said total actual cost, plus or minus the amount of over-payment or under-payment that shall have been made by said railroad company: And *provided further,* That said railroad company shall repay to the state all the money paid, laid out and expended under the terms and provisions of said agreement within fifteen years after the first payment by it made, as herein provided. It is expressly understood and agreed that no interest charge shall be made or accepted by the state on account thereof, except on past due installments, if any, and then at the rate of five per cent per annum.

8.

The state, acting through its state highway commissioner and with the assistance of the railway company, agrees, at its entire initial expense, but to be fully repaid as hereinafter provided, to acquire by purchase, condemnation or otherwise a one hundred foot right of way, hereinafter referred to as the new right of way, together with such additional width as and where necessary to provide for proper cuts, fills and drainage for the proper development of said one hundred foot right of way for railroad purposes, between the aforesaid points, on the route designated on the blueprints, dated October four, nineteen hundred twenty-six, identified by the signature

of the state highway commissioner and the chief engineer of the railway company, which are on file with the parties hereto and which are hereby made a part hereof, it being understood that the portion of the old right of way at or near said mile post thirteen, which lies within the new right of way, shall continue as part of the latter, and that the portion of the old right of way from said mile post twenty-two and one-tenth to mile post twenty-one and thirty-five one-hundredths which lies within the new right of way, shall continue as part of the latter; also to likewise acquire the necessary additional land for station grounds at Birmingham, on the altered and relocated route, including that necessary for depot, freight house, team tracks, passing tracks, and other usual and necessary appurtenances, such additional land to be four thousand feet in length and approximately three hundred feet in width, including said one hundred foot right of way, as indicated on said blueprints.

(a) It is understood and agreed that the acquisition of said new right of way and other lands shall be promptly commenced, prosecuted and completed, and that such acquisition shall be under the joint supervision of the state highway commissioner and the said railway company's chief engineer; they shall jointly appoint competent agent or agents to conduct the negotiations for such right of way and other lands, and shall have full authority to fix the compensation of such agent or agents, and to discharge them at any time. No purchases shall be made except on the joint approval, in writing, of said state highway commissioner and chief engineer, and should either disapprove of the price of any proposed purchase, then the same shall not be concluded, but the land therein involved shall be acquired by condemnation. When condemnation is necessary, proceedings therefor shall be instituted and conducted in behalf of the state, by its proper officers, but with the right in the railway company, through its attorney or attorneys and other representatives, to participate in such proceedings. All expenses involved in such acquisition, including detailed surveys and map work, therefor, shall be considered and treated as a part of the cost thereof, except that there

shall not be included in such expenses any allowance for the services of the said state highway commissioner or chief engineer, or the attorneys for the parties.

(b) If the state highway commissioner, in the purchase of said new right of way and other lands, finds it expedient or necessary to purchase more land, adjacent to any part thereof, than may be actually required, it is understood and agree that he may do so, provided such purchase shall be approved, in writing, by the said railway company's chief engineer, and that the cost of such additional land shall be considered and treated as a part of the cost hereunder, and that the surplus land, either the whole or any part thereof, shall be disposed of on the best terms obtainable, at such time or times as the state highway commissioner and said chief engineer may deem expedient, if such disposition is prior to the making and delivery of the exchange deeds herein provided for, the state highway commissioner and said chief engineer to approve, in writing, each and every proposed disposition thereof, and the net proceeds thereof shall be credited to the cost hereunder. If such disposition of any part of such surplus lands has not been made prior to such exchange deeds, then any remaining portion thereof shall be included in the deed to the railway company, and it shall thereafter be the sole owner thereof.

(c) Evidences of good, merchantable title to said new right of way, and other land, in the form of abstracts or otherwise, shall, from time to time, as said right of way and other land is acquired, be furnished by the state highway commissioner to the railway company, and the cost and expense thereof shall be deemed a part of the cost of said right of way.

9.

The railway company agrees, at the entire initial expense of the state, but to be fully repaid, as hereinafter provided, to itself do, or cause to be done by letting on contract to a contractor or contractors, all the work, including the furnishing of all materials for the grading of said new right of way, for a double track railroad, in-

cluding all necessary drainage structures; also including the separating of the grades and crossing protection at the railroad crossings specified in general plans herein mentioned; also including the construction on said new right of way of a single track railroad, with necessary appurtenances, including construction on new right of way of telegraph pole lines and wires and other telegraph facilities of like kind as those now existing on old right of way; and also including facilities on new station grounds at Birmingham of like kind as those now existing on old station grounds, all on the grade and according to the general plans and specifications annexed to the contract dated September second, nineteen hundred twenty-six, and filed in the office of the secretary of state, September third, nineteen hundred twenty-six; detailed plans and specifications to be prepared by the railway company as the work progresses, the expense thereof to be considered and treated as part of the cost of the work hereunder, all to be of the standard of first class for a modern railroad, not less than required by law; said work to be commenced and prosecuted with reasonable diligence after the new right of way has been acquired: *Provided,* That the railway company, at its option, may, before said new right of way has been fully acquired, commence and prosecute such work in any section where sufficient of the new right of way has been acquired to permit of expenditious and economical work.

(a) It is understood and agreed that the state highway commissioner, with the assistance of the railway company, shall procure any and all necessary public approval of the work to be done hereunder; and that the railway company, with the assistance of the state, shall procure any and all necessary approval from the interstate commerce commission for the abandonment of its old rights of way and relocation on its new right of way; and that any damages and/or expenses arising out of the carrying out of this contract shall be considered and treated as a part of the cost thereof.

(b) When the single track with appurtenances has been constructed as aforesaid, the railway company shall physically connect the same with its railroad at said mile

posts thirteen and twenty-two and one-tenth, the expense thereof to be considered and treated as part of the cost of the work hereunder.

(c) It is understood that it shall be optional with the railway company to itself perform any or all of the work hereby provided for, or to let the same on contract to a contractor or contractors. As to work which the railway company elects to let to a contractor, it shall procure proper bids of contractors, and will award the work to contractor or contractors at prices which shall first have been approved, in writing, by the state highway commissioner; and will make the necessary contract or contracts with the contractor or contractors, and pay for the work and materials by monthly estimates.

(d) It is understood and agreed that the railway company shall appoint a competent engineer to have general charge and supervision of the work herein provided for, both that performed by the railway company itself, and that performed by contractors, subject to the provisions hereof, and that he shall have authority to employ necessary assistants, including inspectors, and that the expense of such engineer, assistants and inspectors, including salaries or wages, field office, supplies, or any other items necessarily incident to said work, shall be considered and treated as a part of the cost of the work.

(e) It is understood and agreed that, as to work performed by the railway company itself, there shall be added to the cost of all materials furnished by it from stock to accomplish such work, fifteen per cent to cover the expenses of handling in transit, freight charges accruing on materials (the shipment of which originates on lines of railway companies comprising the Grand Trunk railway system), accounting, and other like overhead expenses which it is impracticable to allocate; it being understood that all other materials shipped for use in such work are to be purchased f. o. b. Royal Oak or Birmingham, for delivery at such place there as may be designated by the railway company, and said fifteen per cent shall not apply to any material so purchased.

(f) To the cost of all labor, performed by the railway company itself, including foremen, there shall be added

ten per cent to cover the cost of accounting, use of small tools, and other like overhead expenses, which it is impracticable to allocate.

(g) It is further understood and agreed that, as to work performed by contractors for the railway company and as to materials purchased f. o. b. Royal Oak or Birmingham, as aforesaid, there shall be added to the cost thereof, as fixed by contract, one per cent to cover the cost of advertising for bids, letting contracts, accounting, and other like overhead expenses which it is impracticable to allocate.

(h) It is further understood that the railway company will be required to furnish certain equipment for use in such work, and it is agreed that for equipment owned or controlled by it, or by companies comprising the Grand Trunk railway system, rental may be charged, and included in the cost of the work, such rental to be reasonable and according to the prevailing charges for like or similar purposes, and also other expenses contracted therewith, as well as the actual rental and other expenses paid for equipment leased from outside parties.

(i) The railway company shall monthly render to the state highway commissioner, acting for the state, bills covering the cost to it for the preceding month, including all expenditures made hereunder, which are chargeable to the cost of the work, whether for work by itself performed, or for work performed by contractors for it, according to estimates to be made by the railway company's chief engineer, the state highway commissioner or his representatives to have access to all the railway company's records pertaining to such work for the purposes of checking the same, and the state agrees to pay such monthly bills within thirty days from the date of rendition; if not paid within thirty days after rendition, said bill or bills shall bear interest at the rate of five per cent per annum until paid; and said bills, together with accrued interest thereon, shall be deductible from the next succeeding annual payment or payments under paragraph seven hereof if not paid by the state before such payments become due; such accrued interest, if any, thus deducted shall not be considered and treated as a part of

the cost of the work to be repaid by the railway company under said paragraph seven.

(i) When the construction aforesaid, including the furnishing of the materials, and also including the physical connection of said new single track with the railway company's railroad at mile posts thirteen and twenty-two and one-tenth, as aforesaid, is completed, the railway company shall promptly remove the physical materials, such as rails, ties, etc., from the old right of way, and the fair, net value thereof, with proper allowance for depreciation and expense of removal, as specified in the schedule annexed to the contract dated September second, nineteen hundred twenty-six, and filed in the office of the secretary of state, September third, nineteen hundred twenty-six, shall then be credited to, and deducted from, the total cost incurred by the state hereunder.

10.

This contract shall inure to and be binding upon the respective successors and assigns of the parties hereto, and in event said railway company consolidates with, leases or sells its railroad and other property to any other railroad company, whether of the Grand Trunk railway system, or otherwise, the rights, duties and obligations of the parties hereunder shall run with such railroad and other property without loss or waiver thereby of any of the same, and the consolidated, purchasing or lessee railway company shall hold the same with all rights and obligations pertaining thereto, hereunder, including the obligation and the right to make the payments herein specified without further responsibility for taxes in addition to the annual sum of twenty-five thousand one hundred seventy-one dollars and forty cents ($25,171.40), until the time shall have expired for the making of such payments in full to the state by said railway company, as herein specified; said railway company is not to obtain, however, an extension of the time herein specified, at which it is to come under the general railroad laws of the state for the purposes of taxation, nor be longer exempted from taxation under the general laws of the

state providing for the taxation of railroad companies, by reason of any default in performance, or failure to pay, as herein provided, upon its part.

11.

Should any dispute arise between the parties hereto involving any matters herein it shall be submitted to a committee composed of the governor of the state of Michigan, the president of said railway company, and a third person, to be selected by them. In the event that the governor of the state of Michigan and the president of the Detroit, Grand Haven and Milwaukee railway company shall be unable to agree upon a third arbitrator, the then senior judge of the United States district court, for the eastern district of Michigan, shall select such third arbitrator upon the written application of either party. Said committee shall fix a time and place of hearing, give reasonable notice to the parties, who shall have the right to introduce such evidence and arguments as may be deemed proper, and the decision of a majority of said committee shall be final and conclusive as to the matter submitted to them. The expense of such arbitration shall be borne by the parties hereto equally, provided such committees may, in its discretion, otherwise apportion such expense.

If at any time after the execution, ratification and approval of this contract it shall be deemed necessary and advisable by the state to make additional grade separations along the line of said new right of way, in addition to the grade separations provided for in the plans and specifications herein referred to and made a part of this contract, said additional grade separations shall be made and the expense thereof be paid, as provided by the general laws of the state of Michigan governing the separation of grades at railroad crossings.

13.

The state reserves the right to change or relocate the new right of way herein specified, with the consent of the chief engineer of said railway company, but in case

of such change of location of new right of way, the grade thereof shall conform substantially to the grade herein referred to and provided for, and the cost of securing said right of way and of paying for the same, shall be ascertained, fixed and paid as herein provided, but nothing herein contained, if it may change the total amount to be paid, laid out and expended by the state, shall change, modify or extend the time within which said railway company shall pay and reimburse the state in full for any and all moneys paid, laid out and expended by it in carrying out and performing the terms and conditions of this contract, incumbent on its part to be carried out and performed by it.

14.

This contract and agreement shall not be binding until it shall have been ratified and approved by the legislature of the state of Michigan, signed on behalf of said state by the governor, attested by the secretary of state, under the great seal of the state, and signed by the state highway commissioner, and until the same shall have been executed on behalf of said railway company by its proper officers.

15.

The state, on the carrying out and fulfilling of this contract by the parties hereto expressly abandons and fully relinquishes any right it has, or now claims to have, to purchase or otherwise acquire the railroad and/or other property of the railroad company, under the special charter or otherwise.

In Witness Whereof, The parties hereto have caused this contract to be executed in quadruplicate, in their

corporate names, by their respective duly authorized officials, this.....day of.....A. D. 1927.

STATE OF MICHIGAN

By: .....
Governor

Attest: .....
Secretary of State

.....
State Highway Commissioner

DETROIT, GRAND HAVEN and MILWAUKEE RAILWAY COMPANY

By: .....
President

Attest: .....
Secretary

This act is declared to be immediately necessary for the public health, peace and safety.

This act is ordered to take immediate effect.

Approved June 1, 1927.

RAILWAY CONDEMNATION STATUTES

(160) § 8249. SEC. 15. Whenever any lands are condemned to the public use, by any railroad, bridge or tunnel company, under the provisions of this act, such company shall pay to the owners and others interested in the lands condemned, in addition to the damages and compensation awarded by the commissioners or jury, a reasonable attorney fee, to be fixed and determined by the court when the report or verdict is confirmed, or as soon thereafter as may be, and the attorney fee, so allowed, together with witness fees and other costs and disbursements, to be taxed as in civil actions, shall be paid, tendered, or deposited with the damages or compensation as hereinafter provided, before such company shall have any right to enter upon or take possession of the lands condemned.

(161) § 8250. SEC. 16. In case any of the real estate required by said company for the purposes aforesaid is owned by a person insane, a minor, or otherwise incompetent and under guardianship, and such company and the guardian of such person shall agree upon a price for the same, and enter into a contract in writing therefor, the said guardian shall, upon the approval of the same by the probate court of the county in which the said real estate is situated, convey said real estate, in accordance with the terms of such contract, to said railroad company, and the deed thereof shall be valid in law to convey the title of such person under guardianship to said company, in accordance with the terms of said contract.

(162) § 8251. SEC. 17. In case any railroad, bridge or tunnel company is unable to agree for the purchase of any real estate property or franchises required for the purpose of its incorporation, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this act; but there shall be no power, except for crossing, to take the track or right of way of any other railroad company except when any road-bed or part thereof has for five years remained, or shall hereafter for five years remain in an unfinished condition and without having the ties and iron placed and continued thereon up to the time measures are instituted to appropriate the same as hereinafter authorized, any other railroad corporation shall have the right to acquire title to the same and to the real estate and easements held by such company for use in connection therewith, in the manner prescribed for obtaining other property or franchises required for its use, and in such case proceedings may be instituted in a court of record of any county wherein a part of such road-bed sought to be acquired may be situate, and all of such road-bed and property aforesaid within this state, or only a part thereof at the election of the applicant may be included in one proceeding. Notice of the application shall be given the company or corporation owning or claiming an interest in the road-bed and property mentioned when created under the laws of this state by serving a copy of the peti-

tion and notice hereinafter mentioned personally upon its president, any vice president, superintendent, secretary, treasurer, general manager, or general counsel, if either of them reside within the state, ten days or more prior to the presentation of the same to the court, but if they do not, then service may be made by publication as required by section eighteen of this act, except in such case a description of the property as in this section provided shall be sufficient, and if such company or corporation was not created under the laws of this state, it may be served by delivering such copy of the petition and notice to either of said officers personally at least thirty days previous to presenting such petition to the court, or by publication as required in said section eighteen, except it shall be sufficient to describe the property to be taken as provided in this section. It shall be sufficient in such petition to describe the property sought to be appropriated as the line is designated in the articles of association, or articles amendatory thereof, and by which it was established, and further designating it as the roadbed and property connected therewith of the company or corporation then owning or claiming it whose title is sought to be acquired.

(163) § 8252. Sec. 18. For the purpose of acquiring such title such company may present a petition to any court of record for such county, praying for the appointment of three commissioners. Said petition shall be in the name of the company, shall be signed by one of the directors, or the engineer or the attorney of said company on its behalf, and shall be verified by the oath of the person so signing the same, and shall contain the description of all the real estate, property or franchises, or so much thereof as the company seeks to acquire under such petition in said county; and that said company is duly incorporated; that it has a railroad, railroad bridge or railroad tunnel constructed, specifying the points from and to which the same is in operation, or that it is the intention of said company, in good faith, to construct, finish and maintain a railroad, railroad bridge or railroad tunnel from and to the places named for that purpose in its articles of association; that the

capital stock of the company has been in good faith subscribed as required by this act to organize such company; that the property described in the petition is required for the purpose of constructing, operating or repairing the railroad or its appurtenances, or the railroad bridge or tunnel or its appurtenances, as the case may be; and that the taking thereof is necessary for the public use, and that the company has not been able to acquire title thereto, and the reason of such inability. The petition must also state the names and places of residence of the parties, so far as the same can with reasonable diligence be ascertained, who own, or have, or claim to own or have, estates or interests in said lands or property; and if any such persons are infants, their ages, as near as may be, must be stated, and if any of them are idiots, or persons of unsound mind, or are unknown, it must be so stated, together with such other facts and allegations as to incumbrances or otherwise as will be sufficient to show who have or claim to have interests in said lands, real estate or property, and such other matters as the company may see fit to make. A copy of such petition, with a notice of the time and place when and where the same will be presented to such court, must be served on all persons whose interest will be affected by the proceeding, at least ten days prior to the presentation of the same to the court, as follows, viz.:

First. If the person upon whom service is to be made resides in this state, and is not an infant under the age of fourteen years, idiot or person of unsound mind, service of a copy of such petition and notice must be made on him or his agent or attorney authorized to contract for the sale of real estate described in the petition, personally, or by leaving the same at the usual place of residence of such person or agent, with some person of suitable age; and if he resides out of this state, but has such agent as aforesaid residing in this state, then such service may be made on such agent in the manner aforesaid, or upon him personally out of or within this state; or it may be by publishing a notice stating briefly the object of the application, and giving a description of the land, interest therein, or property to be taken, and in

some paper published in the county in which the said lands or property are situated, if there be one, and if not, then in some weekly paper published in the city of Detroit once in each week for six successive weeks next previous to the presentation of the petition; and if the residence of such person or persons residing out of this state be known, a copy of such petition and notice shall be deposited in the postoffice at least thirty days previous to presenting such petition, directed to such person at his place of residence, as near as may be, postage prepaid;

Second. If any person on whom such service is to be made is a minor under the age of fourteen years, or an idiot or person of unsound mind, and resides in this state, such service shall be made as aforesaid on his guardian, or if none, then on the person who has the care of, or with whom such infant, idiot or person of unsound mind resides;

Third. If the person on whom such service is to be made be unknown, or his residence unknown, then such service may be made by publication for six weeks in the same manner provided in the first subdivision of this section, and the court or judge shall appoint an attorney to appear for and protect the rights of any such person;

Fourth. In case any party to be affected by the proceedings is an infant, idiot or person of unsound mind and has no guardian, the said court, or the judge of said court, shall appoint a special guardian or committee to appear for and attend to the interests of such infant, idiot or person of unsound mind, and all notices to be served in the progress of the proceedings may be served on such special guardian;

Fifth. In all cases not otherwise provided for, service of orders, notices and other papers in the proceedings authorized by this act may be made as the said court or judge may direct.

(164) § 8253. Sec. 19. Whenever the line or road of any company organized under this act shall be in the possession or use of any other railroad company, under any lease, contract, or agreement, for the building or operating the same, under the laws of this state, it shall be competent for the latter company, with the assent and

in the name of the former company, to institute and prosecute proceedings for acquiring title to any land or property for the purposes and under the conditions mentioned in preceding sections. In such case the petition may be signed and verified by a director, engineer or attorney of either company. Whenever any company organized under this act shall be in use or possession of any railroad acquired from another company, by purchase or consolidation, it shall be competent for the company so in possession and use to institute and prosecute condemnation proceedings in its own name, to acquire land or property for railroad purposes, in connection with the railroad so acquired. In such case the petition and proceedings shall, so far as practicable, comply with the general provisions of the statute regulating condemnation proceedings.

(165) § 8254. Sec. 20. On presenting such petition to said court or the judge thereof at chambers, with proof of service of a copy thereof, and due notice as aforesaid, all persons whose estate or interest are to be affected by the proceedings, may show cause against the prayer of the petition, and may disprove any of the facts alleged therein; and said court or judge shall hear the proofs and allegations of the parties; and if no sufficient cause is shown against granting the prayer of the petition, said court or judge shall make an order appointing three disinterested and competent freeholders as commissioners to ascertain and determine the necessity for taking such lands, franchises or other property, and to appraise and determine damages or compensation to be allowed to the owners and persons interested in the real estate or property proposed to be taken in such county for the purposes of the company; and such court or the judge thereof shall fix the time and place for the first meeting of such commissioners: Provided, That any person or persons, or company, whose estate or interest is to be affected by the proceedings, may demand and have from such court, at the time of hearing of said petition, a jury of twelve freeholders of said county to ascertain and determine the necessity for taking such lands, franchises, or other property, and to appraise and

determine the damages or compensation to be allowed therefor. Thereupon the court shall direct the sheriff or any constable of the county, to make a list, in writing, of twenty-four inhabitants of the county, qualified to serve as jurors in the courts of record in this state. Such sheriff or officer shall, before he proceeds to make such list, be sworn by the court or judge to select such persons according to his best judgment, and without favor or partiality to either party. From such list the person or persons demanding such jury may alternately strike off six names, and the railroad company six names, and in case of either of them refusing or neglecting to do so, the judge shall strike off from said list for the party so refusing or neglecting, so as to leave only twelve names thereon. Such court, or the judge thereof, shall issue a venire in the usual form, inserting therein the twelve names so remaining on said list, and requiring such jury to meet at the time and place appointed therefor by the court, which said venire may be served by the sheriff, any constable, or other proper officer of the county, as in other cases; and if at the time and place appointed by said court or judge for said jury to meet, any of the persons named as jurors do not attend, or if any named in the venire, or chosen as talesmen, shall be rejected in a challenge for cause (which right of challenge is hereby granted), it shall be competent for said court, or the judge thereof, to order the said sheriff or other officer to summon immediately as many competent persons as may be necessary, with the persons in attendance as jurors, to furnish a panel of twelve jurors; and if no jury be demanded on the part of any person mentioned in said petition, his or her right to the same shall be deemed to have been waived. In case any parcel of land is owned or occupied by parties having different interests or estates therein or in any part thereof, they may be united as respondents in respect to the same in the petition, and thereafter the proceedings touching the same shall be carried on as one suit. The demand of any one of the respondents for a jury shall be deemed to be a demand for all; and if they shall fail or neglect to unite in striking six names from the jury list, the judge shall

strike off six names for them; and in such cases the jury shall not only determine the entire damages and compensation to be paid for the whole property taken, but shall, in their report, also justly and impartially apportion and award the amounts to be paid to the owner or owners of each estate in the lands so taken.

(166) § 8255. SEC. 21. The commissioners shall take and subscribe the oath prescribed by article eighteen of the constitution.[1] Any of them may issue subpoenas, administer oaths to witnesses, and a majority of them may adjourn the proceedings before them from time to time in their discretion. Whenever they meet, except by appointment of the court or judge, or by previous adjournment, they shall cause reasonable notice of such meeting to be given to the parties who are to be affected by their proceedings, or the attorneys or agents of such parties. They may view the premises described in the petition, and shall hear the proof and allegations of the parties, and shall reduce the testimony, if any is taken by them, to writing, if requested to do so by either party, and after the testimony is closed in such case, and without any unreasonable delays, and before proceeding to the examination of any other claim, all being present and acting, shall ascertain and determine the necessity of taking and using any such real estate or property for the purposes described; and if they deem the same necessary to be taken, they shall ascertain and determine the damages or compensation which ought justly to be made by the company therefor to the party or parties owning or interested in the real estate or property appraised by them. They shall also determine and certify what sum ought to be paid to the general or special guardian of an infant, idiot, or person of unsound mind, or to said court, to be held for an unknown party in interest not personally served with notice of the proceedings and who has not appeared, for damages and cost or expenses and counsel fees. They shall make a report to said court or judge, signed by them, of the proceedings before them, if any, which may be filed with the clerk of the court,

[1]See Const. of 1909, Art. XVI, 2.

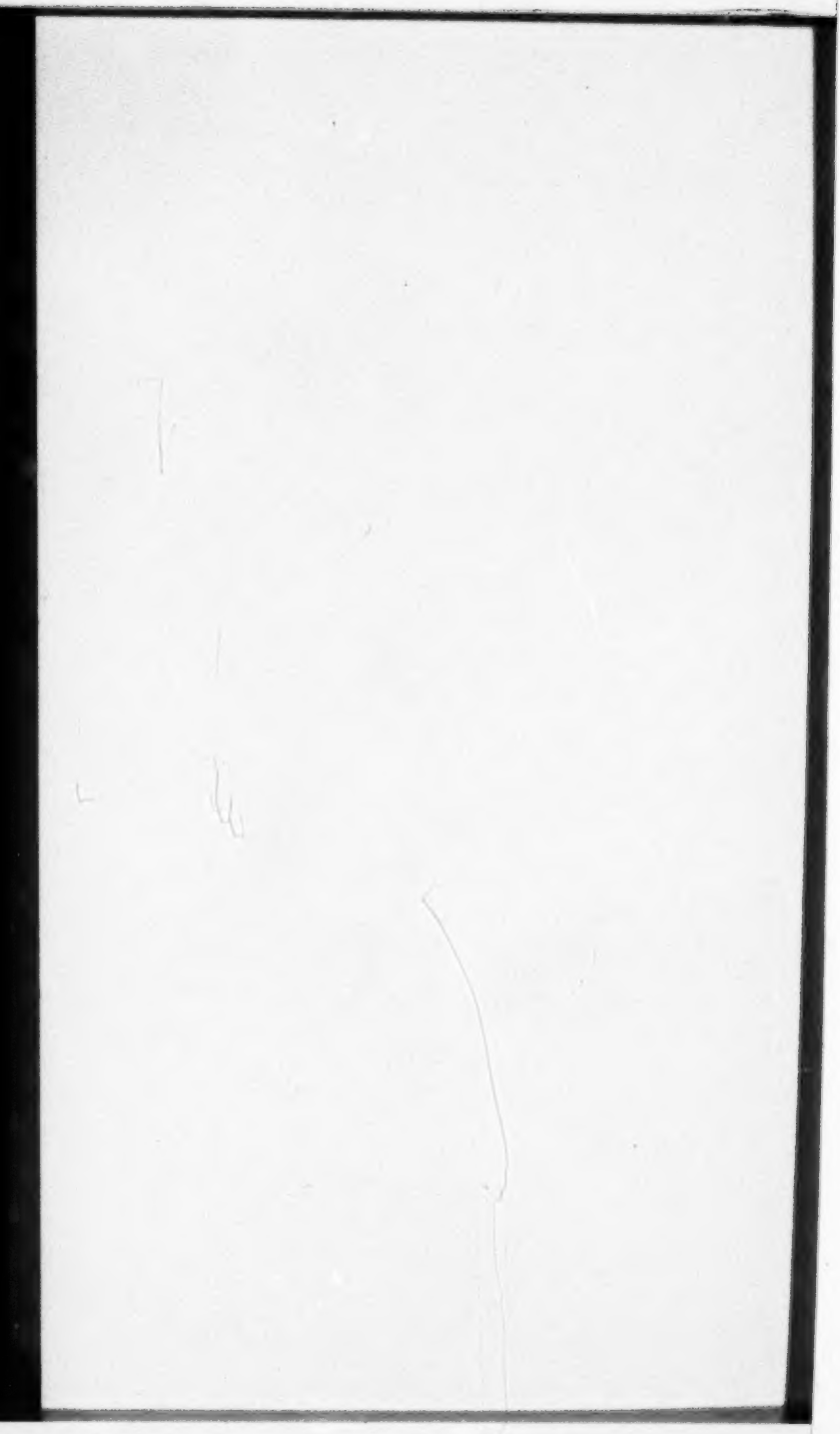
either in vacation or term time, or the probate court, as the case may be. Said commissioners shall be entitled to two dollars a day for each day they are engaged in the performance of their duties, to be paid in the first instance by the company. In case a jury shall have been demanded and ordered by the court, pursuant to section twenty-one of this article, the said jury shall proceed to ascertain and determine the necessity of taking and using any such real estate or property, and the damage or compensation to be paid by the company therefor, in the same manner and with like effect as is provided in this section in the case of commissioners, and as is further provided in said section twenty-one; but they shall all be present and act together during the proceedings, and before acting shall take and subscribe an oath that they will justly and impartially ascertain and determine the necessity of taking and using any such real estate or property for the purposes proposed; and if they deem the same necessary to be taken, will ascertain and determine the damages or compensation which ought justly to be made by said company to the owners of or persons interested in each particular description of real estate mentioned in said petition who have demanded said jury; and they shall be entitled to two dollars for each day they are engaged in the performance of their duties, to be paid in the first instance by the company. The said judge, or a circuit court commissioner to be designated by him, may attend said jury, to decide questions of law and administer oaths to witnesses, and he may appoint the sheriff or other proper officer to attend and take charge of said jury while engaged in said proceedings. And the jury shall proceed to determine the amount of damages to be awarded, and shall have all the powers hereby conferred upon commissioners; and a report signed by the jury, where the judge is or is not in attendance, shall be valid and legal. At any time before the report of the jury or commissioners shall be made to the court it shall be competent for the company, after sufficient cause has been shown and with leave of the court, to discontinue all pending proceedings in any case and to institute new proceedings at any time thereafter; but

the company in all such cases shall pay all the costs of such proceeding so discontinued, with an attorney fee, to be taxed as in cases at law.

(167) § 8256. SEC. 22. On such report being made by the commissioners or jury, the court, on motion, shall confirm the same on the next or any subsequent day when in session, unless for good cause shown by either party; and when said report is confirmed, said court shall make an order containing a recital of the substance of the proceedings in the matter of the appraisal, and a description of the real estate or property appraised, for which compensation is to be made, and shall also direct to whom the money is to be paid, or when and where it shall be deposited by the company. Said court, as to the confirmation of such report, shall have all the powers usual in other cases.

(168) § 8257. SEC. 23. A certified copy of the order so to be made shall be recorded in the office of the register of deeds for said county, in the book of deeds; and thereupon, on the payment or deposit by the said company of the sum to be paid as compensation for such land, franchise, or other property, and for costs, expenses, and counsel fees as aforesaid, and as directed by said order, the company shall be entitled to enter upon and take possession of and use the said land, franchise, and other property for the purpose of its incorporation; and all persons who have been made parties to the proceedings, either by publication or otherwise, shall be divested and barred of all right, estate, and interest in such real estate, franchise, or other property, until such right or title shall be again legally vested in such owner; and all real estate, or property whatsoever, acquired by any company under and in pursuance of this act, for the purpose of its incorporation, shall be deemed to be acquired for public use: Provided, The said sum [to] be paid as damages, and compensation, and costs, expenses, and counsel fees as aforesaid, shall be paid by the company, or deposited as provided in this act, within sixty days after the confirmation of said report by the said court; and in case said company fail or neglect so to do, such failure or neglect shall be deemed as a waiver and aban-

donment of the proceedings to acquire any rights in said land or property. Within twenty days after the confirmation of the report of the commissioners or jury, as above provided for, either party may appeal, by notice in writing to the other, to the supreme court, from the appraisal or report of the commissioners or jury; such notice shall specify the objections to the proceedings had in the premises, and the supreme court shall pass on such objections only and all other objections, if any, shall be deemed to have been waived; such appeal shall be heard by the supreme court of any general or special term thereof, on notice thereof being given according to the rules and practice of the court. On the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners or jury, in its discretion. The second report shall be final and conclusive upon all parties interested. If the amount of the compensation to be allowed is increased by the second report, the difference shall be a lien on the land appraised, and shall be paid by the company to the parties entitled to the same, or shall be deposited as the court shall direct; and in such case, all costs of the appeal shall be paid by the company; but if the amount is diminished, the difference shall be refunded to the company by the party to whom the same may have been paid, and judgments therefor and for all costs of the appeal shall be rendered against the party so appealing. On the filing of the report, such appeal, when made by any claimant of damages, shall not affect the said report as to the right and interests of any party, except the party appealing; nor shall it affect any part of said report in any case, except the part appealed from; nor shall it affect the possession of such company of the land appraised; and when the same is made by others than the company, it shall not be heard except on a stipulation of the party appealing not to disturb such possession during the pendency of such proceedings.



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1929

In Equity No. 338.

FRANK H. DOHANY,

Appellant,

VS.

FRANK F. ROGERS, State Highway Commissioner for the State of Michigan; the DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, a Michigan Corporation; and the H. W. NELSON COMPANY, of Chicago, Illinois, a foreign corporation,

Appellees.

BRIEF OF THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY AND THE H. W. NELSON COMPANY, APPELLEES.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1929

In Equity No. 338

FRANK H. DOHANY,

Appellant,

vs.

FRANK F. ROGERS, State Highway Commissioner for the State of Michigan; the
DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY, a Michigan corporation; and the
H. W. NELSON COMPANY, of Chicago, Illinois, a foreign corporation,

Appellees.

BRIEF OF THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY AND THE H. W. NELSON COMPANY, APPELLEES.

I.

JURISDICTION.

The Parties Defendant Have Ceased to Exist and Appellant Did Not Substitute Their Respective Successors. Therefore, This Is a Moot Case and Should Be Dismissed.

The Attorney General has pointed out (page 8 of his brief) that the defendant Rogers resigned as State Highway Commissioner on January 1st, 1929, and that

another was appointed to fill the vacancy, which other has since been elected to the office for a full term. Also, the Detroit, Grand Haven and Milwaukee Railway Company has ceased to exist because of having consolidated with other railroad companies to form the Grand Trunk Western Railroad Company. The consolidation became effective November 1st, 1928, and on November 8th, 1929, the consolidated company was authorized by the Interstate Commerce Commission to operate the lines of railroad formerly owned and operated by the several constitutent companies, including those of the Detroit, Grand Haven and Milwaukee Railway Company.

Unification and securities of Grand Trunk Western Railroad Company, I. C. C. Finance Docket No. 7320[1], *decided November* 8, 1929.

The appointment and subsequent election of a successor to the defendant Rogers, as State Highway Commissioner, is a matter of public record in the office of the Secretary of State of Michigan. The record of the consolidation of the Detroit, Grand Haven and Milwaukee Railway Company with other railroad companies to form Grand Trunk Western Railroad Company is a matter of public record in the offices of the Secretaries of State of Michigan and Indiana. These are matters of which the court will take judicial notice, and the order of the Interstate Commerce Commission in respect of the consolidation is also a public record of which the court will take judicial notice.

Caha v. United States, 152 *U. S.* 211, 38 *L. Ed.* 415, 14 *Sup. Ct.* 513.

Jenkins v. Collard, 145 *U. S.* 546, 36 *L. Ed.* 812, 12 *Sup. Ct.* 868.

Knight v. U. S. Land Ass'n, 142 *U. S.* 161, 35 *L. Ed.* 974, 12 *Sup. Ct.* 258.

Thompson v. Missouri Pacific R. R. Co., 15 *Federal (2nd)* 28.

Goulette's Adm'r v. G. T. Ry. Co., 93 *Vt.* 266, 107 Atl. 118.

Yet appellant has made no motion to substitute the successor in office of the State Highway Commissioner or Grand Trunk Western Railroad Company, successor to Detroit, Grand Haven and Milwaukee Railway Company, as parties defendant, and for an order permitting the cause to be continued and maintained against such successors.

Therefore, this cause of action has abated as to the State Highway Commissioner and Detroit, Grand Haven and Milwaukee Railway Company, and the matters argued in appellant's brief have now become moot questions. For this reason the bill should be dismissed.

United States Sup. Ct. rule No. 17, *paragraph* 4.

U. S. C. A. title 28, *section* 780.

Oklahoma Natural Gas Co. v. the State of Oklahoma, 273 *U. S.* 257, 47 *Sup. Ct.* 391, 71 *Law Ed.* 634 *(Oklahoma* 1927).

II.

STATEMENT OF THE CASE.

The Statement of the Case as Contained on Pages 2 and 7, Inclusive, of Appellant's Brief Is Erroneous in Several Important Particulars.

No extended discussion of the facts will be here attempted, but we shall confine ourselves to pointing out

to the Court those errors in the facts as stated in appellant's brief which are material to the issues to be discussed.

The first paragraph on page 2 of appellant's brief is so worded as to give the impression that the main consideration for the acquiring by the State of a new right of way to be later conveyed to the Railway Company is to be the surrender by the Railway Company to the State of its special charter, whereas the main consideration is the agreement by the Railway Company to convey to the State its present right of way in order that the State may be permitted to widen and otherwise improve a State Trunk Line Road.

The public highway mentioned in plaintiff's bill of complaint, known as Woodward Avenue, runs northwesterly from Detroit, a distance of approximately twenty miles, to Pontiac, Michigan. It is a Federal aided road and has been designated as U. S. Road No. 10. It has been, and is, by statute, a State Trunk Line Road.

Act No. 334 *of the Public Acts of* 1913 *of the State of Michigan.*

Act No. 12 *of the Public Acts of* 1925 *of the State of Michigan.*

The construction, improvement and maintenance of it is now, and since 1913 has been, under the supervision, direction and control of the State Highway Commissioner.

Act No. 334 *of the Public Acts of* 1913 *of the State of Michigan.*

Act No. 19 *of the Public Acts of* 1919, *as last amended by Act No.* 257 *of the Public Acts of* 1921 *of the State of Michigan.*

The State of Michigan pays the entire cost of such construction, improvement and maintenance.

Act No. 17 *of the Public Acts of* 1925 *of the State of Michigan.*

In the construction, improvement and maintenance of said highway, the State Highway Commissioner acts as an agency of the State in the performance of a governmental function.

Gunther v. Board of County Com'rs of Cheboygan County, 225 *Mich.* 619.
Longstreet v. Mecosta County, et al., 228 *Mich.* 542.

Said public highway is one of the most heavily travelled roads in the State of Michigan, or in the United States, and in 1924 the State undertook the improvement thereof by widening it to a width of 200 feet and paving it with two slabs of 40-foot concrete with curbs, gutters, parking spaces, etc. The project has now been completed except from Royal Oak to Bloomfield Center, all in Oakland County, Michigan, where the railroad right of way and tracks of the Detroit, Grand Haven and Milwaukee Railway Company adjoins the highway and right of way on the northeasterly side. In order to complete the widening, in accordance with the plans and specifications of the State Highway Commissioner, it is necessary for the State to acquire the present railway right of way between said points (pages 59-60).

The Railway Company is a common carrier engaged in interstate and intrastate commerce and in order to perform its functions as such carrier, it must either retain its present right of way or acquire a new one before surrendering it for highway purposes.

Act No. 340 of the Public Acts of 1927 of the State of Michigan and the Contract between the State and said Detroit, Grand Haven and Milwaukee Railway Company, dated July 20, 1927, provided for the securing by the State of a new right of way, the grading thereof and the laying of a single track railroad thereon, after which is to be conveyed to the Grand Trunk Western Railroad Company, successor by consolidation to Detroit, Grand Haven and Milwaukee Railway Company, in exchange for the Company's present right of way required by the State for said public highway widening. The surrender by the Railway Company of its special charter and its undertaking to become subject to the General Tax Laws of the State are incidental to the main purpose of the Agreement and Act.

The Railway Company, itself, has had nothing to do with the widening of Woodward Avenue and has at no time been engaged in relocating its right of way or in acquiring property by purchase or condemnation for such purposes. Its only interest and concern is as disclosed in the contract itself, and arises out of the obvious fact that it cannot operate as a common carrier without an adequate right of way, and if the State of Michigan wishes to acquire the present railway right of way for public highway purposes, a new right of way must first be acquired and equipped to substitute therefor.

On the bottom of page three of appellant's brief it is said that the State Highway Commissioner, at a hearing to determine the necessity of the public highway improvement, held on April 14, 1928, announced, among other things, that the Highway Condemnation Act, so-called:

> "Does not authorize the allowance of any consequential damages, or damages for diminution of the value of the remainder of the tract of land from which land for right of way purposes is taken."

The allegation to this effect in plaintiff's bill of complaint is denied in the answers of the State and the Railway Company (Record, pages 48 and 61) and the Attorney General and counsel for the Railway Company have repeatedly, in open court, as well as in briefs and pleadings, asserted that said Act does allow damages for diminution in value, if any, of a remainder of a tract of land from which a portion is taken for public highway purposes, under the provisions of the General Highway Condemnation Act which is under attack in this case. We say so now to this Court. Furthermore, the Supreme Court of the State of Michigan has interpreted said Highway Condemnation Act (Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927) as requiring such an allowance of consequential damages.

In the case of Fitzsimons and Galvin, Inc., vs. Rogers, 243 Mich. 649, 664, the Court said, with reference to the same procedure as is under consideration in this case:

> "In the present case, as in an ordinary proceeding for condemning a right of way for a railroad, it will be the duty of the commissioners 'to compensate the owner for what his landed interest will suffer from the use proposed to be made of it by the Railroad Company.' *Barnes v. Railway Company,* 65 Mich. 251. Adequate compensation is such only as puts the injured party in as good a condition as he would have

been in if the injury had not been inflicted. It includes the value of the land or the amount to which the value of the property from which it is taken is depreciated."

The same question was also before the Court in the case of Johnstone v. Detroit, Grand Haven & Milwaukee Railway Company, et al., 245 Mich. 65, 68, and the Court there said:

> "It is the rule that where the whole of land is taken, the compensation to be made is the fair value of the land. Where only a part is taken such compensation is not measured by proportionate acreage, but by the amount to which the value of the property from which it is taken is diminished. *Grand Rapids, etc., R. Co. v. Heisel*, 47 Mich. 393. The value of the part actually taken is allowed as direct compensation; but the decreased value of the residue of the parcel, on account of the use made of the land taken, is also allowable as compensation even though it is strictly consequential damage in nature. *Sharp v. U. S.*, 191 U. S. 341 (24 Sup. Ct. 114); 2 Nichols on Eminent Domain, 2nd Edition, Section 236."

It is important that the Court keep in mind that consequential damages, so-called, or diminution in the value of the remainder of plaintiff's land by reason of the use to which the part taken is to be devoted, is, and, in the condemnation proceedings now pending and sought to be enjoined by this suit, will be considered as a proper element of damages to be considered by the Court Commissioners appointed to determine the total compensation which shall be paid to plaintiff as dam-

ages for the taking of a portion of his land. A litigant can be heard to question the validity of a statute only when and in so far as it is applied to his disadvantage.

Rindge Co., et al., v. Los Angeles County, 262 *U. S.* 700; 43 *Sup. Ct.* 689.
Dahnke-Walker Co. v. Bondurant, 257 *U. S.* 282, 289, 42 *Sup. Ct.* 106, 66 *L. Ed.* 239.

On page four of appellant's brief, mention is made of the proposed yards and the resultant damage on account thereof. Aside from the fact that it is not proposed to use said yard for the making and breaking of trains, but only for the storing of cars for the service of local shippers in the Village of Birmingham (there are no industries in said village), the matters mentioned only go to the question of amount of damages. They will be considered by the Court Commissioners, but should not be considered by this Court, in determining the issues of this case.

On the bottom of page 4 of appellant's brief certain figures are given in an attempt to show that the State Highway Commissioner did not in fact consider any consequential damages to the remainder of plaintiff's land. As a matter of fact, plaintiff's land is not worth $3,250 per acre. The evidence submitted to date before the Court Commissioners who are now hearing the parties to determine the compensation to be paid is to the effect that plaintiff's land is not worth more than $2,200 per acre. Obviously, therefore, the State Highway Commissioner either allowed some consequential damages to the remainder of plaintiff's land or considered the land taken to be worth $3,250 per acre, but believed that the balance of his land would not be depreciated. The evidence before the Court Commission-

ers to date is to the effect that the balance of his land will not be depreciated in value, but will in fact be benefited.

The balance of appellant's statement of the case is misleading when considered alone, but the Attorney General's brief contains an accurate statement which, when considered with the matters hereinabove stated, will be sufficient to advise the Court of the controlling issues in the case.

III.

The Three-Judge Statutory Court Below Had Jurisdiction to Entertain Plaintiff's Motion to Dismiss the Bill of Complaint.

This subject is discussed on pages 20 and 21 of appellant's brief where certain cases are cited and quoted from. All of said cases were decided before the amendment to Section 266 of the Judicial Code (U. S. C. A., Title 28, Section 380) of February 13, 1925, C. 229, Section 1, Stat. 938, which provides that "the requirements respecting the presence of three judges shall also apply to the final hearing in such suit in the District Court." The three judges, therefore, now have power to dismiss a bill of complaint, whereas prior to the 1925 amendment and at the time the cases referred to by appellant were decided, they had no such power and said cases are not authority in causes arising after the amendment, such as the case at bar.

While counsel for appellant contends (page 20 of his brief) that the order dismissing the bill "does not purport to be authorized or sanctioned by either or both of the other two judges who heard the case," and that (page 21 of his brief) "there is no showing in the record

that the Court thus composed authorized or directed the single District Judge to enter a decree tested by himself," the opinion of Tuttle, District Judge, concurred in by Moinet, District Judge, expressly says that "the temporary restraining order now in effect must be dismissed, the application for an interlocutory injunction denied and the bill dismissed" (R. p. 77) and the opinion of Hickenlooper, Circuit Judge, concludes with this statement, "I concur in the dismissal of the plaintiffs' bills" (R. p. 83).

Therefore, all three judges did authorize and sanction in writing the dismissal of the bill, and we submit that the written opinions filed in this cause are of at least as binding force and effect, and should be considered much more so, as authorizing and sanctioning an order dismissing the bill as though the three judges were all present in a court room together and verbally directed the entering of such an order. The signed written opinions of the three judges concurring in the dismissal was sufficient to authorize the entering of the order in this case.

If, however, the order denying the application for an interlocutory injunction and dismissing the bill of complaint was not authorized and is not a valid order, then there was nothing for appellant to appeal from and he should have submitted to the three judges an order for their signatures and, upon their refusal to sign the same, to have proceeded by mandamus. Not having done so, this Court, if it should determine that the order complained of is void, can only send the case back for the entering of a proper order in accordance with the opinions of the three judges.

IV.

The Necessity for Taking Appellant's Property Through the Power of Eminent Domain Is Not an Issue in This Case.

The power of eminent domain does not depend for its existence on a specific grant in the Constitution. It is inherent in sovereignty and exists in a sovereign state without any recognition of it in the Constitution. The provisions found in most state constitutions relating to the taking of property for the public use do not by implication grant the power to the government of the state, but limit a power which would otherwise be without limit. The power existed in each of the thirteen states ,immediately on the assumption of independence; and on the admission of a new state such state at once became entitled to, and possessed of, all the rights which belonged to the original states, including the power of eminent domain, free from any restrictions except those contained in its constitution and that of the United States.

10 *R. C. L.* 11-12.

The right of eminent domain does not rest on a statute or on a constitutional enactment.

In re Rugheimer, 36 *Fed.* 369.
Shoemaker v. U. S., 147 *U. S.* 282.
Loomis v. Hartz, 165 *Mich.* 662.
1 *Nicholson Eminent Domain*, 27.

In the Loomis case, supra, the Supreme Court of Michigan said:

> "It should be borne in mind that each state, by virtue of its statehood, has the right to exercise the power of eminent domain. Barron v. Baltimore, 7 Pet. (U. S.) 243."

Elliott on Roads and Bridges, p. 240, says that:

> "The right is founded in necessity and guarded and restricted, *but not created,* by constitutional provisions."

In Lewis on Eminent Domain (2nd Ed.), Vol. 1, it is said, on page 7, that:

> "The correct view is that the power of eminent domain is not a reserved, but an inherent right, a right which pertains to sovereignty as a necessary, constant and inextinguishable attribute."

And in Corpus Juris it is said:

> "Such right antedates constitutions and exists independent of constitutional provisions, which are only declaratory of previously existing universal law. The right can only be denied or restricted by fundamental law and is 'a right inherent in society.' * * * It is not conferred, but may be recognized or limited by the constitutions, which, aside from requiring that the use for which the power is exercised be a public one, and that compensation be made, operate only upon the mode of exercising the right."
>
> 20 *C. J.* 513.

It is also said in Corpus Juris that:

> "In the absence of a constitutional provision on the subject, the mode of exercising the right of eminent domain is within the discretion of the legislature, untrammeled by any limitation except that the purpose is a public one, and that just compensation be paid or tendered to the

owner of the property taken, and the power to prescribe rules of procedure may be delegated."

20 *C. J.* 874.

The Constitution of the State of Michigan provides, as follows:

"Section 1. Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law.

Section 2. When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law: Provided, that the foregoing provision shall not be construed to apply to the action of commissioners of highway or road commissioners in the official discharge of their duties."

Art. 13, *Constitution of* 1908 *of the State of Michigan.*

Article 5 of the United States Constitution reads:

"Nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In the case of Loomis v. Hartz, 165 Mich. 662, the Court said:

"It should be borne in mind that each state by virtue of its statehood has the right to exercise the power of eminent domain. Barron v. Baltimore, 7 Pet. (U. S.) 243. The exercise of such power is a matter entirely under the control of the legislature, subject to such restrictions as are found in the Constitution. The necessity, the occasion, time and manner of its exercise are wholly legislative questions, with the exception just stated. Swan v. Williams, 2 Mich. 427; Woodmere Cemetery v. Roulo, 104 Mich. 595 (62 N. W. 1010).

In Nichols on Eminent Domain (2nd Edition), 915-917, 920, it is said:

"So also the legislature may delegate to municipal or private corporations the right to determine what public improvements they will construct and to take by eminent domain the land required for such improvements, and the decisions of such corporations upon the utility and necessity of the improvements which they decide to construct cannot be questioned in the courts, except in a plain case of abuse. Similarly, when it has been decided that a public

> improvement shall be constructed, whether the power of eminent domain shall be invoked is not a matter for judicial determination. The owner of the land which it has been decided to take is not entitled to be heard upon the question whether an equally available site was not already in possession of the public, or could be bought elsewhere for less than the fair value of his land * * *. The legislature may, and usually does, delegate the power of selecting the land to be condemned to the public agent that is to do the work. In such case it makes little, if any, difference whether the grant of authority is in terms limited to such land as is 'necessary' for the purpose in view, for a general grant of authority carries the same limitation by implication and in either case the necessity is primarily for the party taking and not for the courts to decide, and the decision of such party is final as long as it acts reasonably and in good faith."

The constitutional rights of the land owner to be protected against a taking without the possibility of necessity are sufficiently guarded by his right to institute proceedings at law or in equity to save his property and to have the taking set aside.

2 *Nichols Eminent Domain* (*2nd Edition*) 911.

The only judicial question that is involved in the exercise of eminent domain, on the question of necessity, is whether the use for which the private property is to be taken is a public use. Thus, the question of whether a taking of private property for public highway purposes is a taking for a public use is a judicial

question; but if it is once determined that the taking for such purpose is the taking for a public use, then the question of whether it is necessary to make a particular public highway improvement and to take certain private property therefor is not a judicial question, but is a legislative question. In the case of Shoemaker v. United States, 147 U. S. 282, 298, it was said:

> "The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation be made."

It has been held in Michigan that: "the taking of the lands of a citizen for a public highway is taking property for the use and benefit of the public," within the meaning of our Constitution.

Truax v. Sterling, 74 *Mich.* 160, 165.
People v. Kimball, 4 *Mich.* 95.

And the United States Supreme Court in a recent case (1922) said:

> "that a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial."

Rindge Co. v. Los Angeles County, 262 *U. S.* 700, 706, 43 *Sup. Ct.* 689.

Indeed, it has been said

> "the primary object for the exercise of eminent domain in any community is the establishment of roads."
>
> 1 *Nichols on Eminent Domain*, 13.

The objection of plaintiff that the State Highway Commissioner is not a proper person to determine necessity is without merit. In Rindge Co., et al., v. Los Angeles County, et al., 262 U. S. 700, supra, the Board of Supervisors declared the highways in question to be for public uses. The California code, involved in that case, made the resolutions of the Board of Supervisors conclusive evidence as to the necessity of the project and this Court said:

> "So construed it was held by that Court (California District Court of Appeals, 53 Cal. App. 166, 200 Pac. 27) not to be objectionable to any provision of the State or Federal Constitutions. By this we are controlled so far as the provisions of the state Constitution are concerned. Fullbrook Irrig. Dist. v. Bradley, supra, 164 U. S. 155, 17 Sup. Ct. 56, 41 L. Ed. 369; Georgia Railway v. Town of Decatur, 262 U. S. 432, 43 Sup. Ct. 613, 67 L. Ed. —, decided today. And, so construed, this statute is not in conflict with the Fourteenth Amendment, either because it fails to provide for a hearing by the land owners before such resolution is adopted, or otherwise. The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature and may either be exercised by the legislature or delegated by it to the public officers."

And the Supreme Court of Michigan has held that the determination of necessity by the State Highway Commissioner under the Michigan statute involved in this case does not violate any of the provisions of the Michigan Constitution.

Zeigel v. Genessee County Board of Road Commissioners, 241 *Mich.* 161.

V.

The Statutory Laws and Methods Employed by the State Highway Commissioner to Condemn Appellant's Land Does Not Deprive Him of His Property Without Due Process of Law or Deny to Him the Equal Protection of the Laws.

A. Plaintiff's land is being acquired for public highway purposes.

Appellant argues that the land within the new right of way is being acquired for railroad purposes and not for highway purposes. This is the premise upon which the soundness of his entire argument rests. The defendants, on the other hand, contend that the land taken for the new right of way is necessary for the public highway improvement; that it will be devoted to the public use for which said Woodward avenue is being improved; that the acquisition thereof, whether by purchase or condemnation, is a reasonable adaptation of proper means toward the end of the public use to which said Woodward avenue is being improved and that such public use is a public highway use.

It should be borne in mind that the State of Michigan is engaged in the widening and otherwise improving of a State Trunk Line Road and, in order to com-

plete the project, desires to obtain the present railroad right of way where it parallels and immediately adjoins the highway. The retention of its right of way is essential to the Railway Company to permit it to perform its functions as a carrier engaged in interstate and intrastate commerce, and, while it might itself acquire other land for right of way purposes, it is not bound to do so and the State has no power to condemn the railway right of way longitudinally.

2 *Nichols on Eminent Domain* (*2nd Ed.*) 1000.
Portland R., etc., Co. v. Portland, 181 *Fed.* 632.

There is no statute in Michigan purporting to give the State Highway Commissioner that right.

The State of Michigan itself has undertaken to acquire a new site upon which a line of railroad is to be constructed and which is to be conveyed to the Railway Company in exchange for its old right of way, which, in turn, is required by the State for the completion of the governmental work of improving a State trunk line highway.

In the case of Brown v. U. S., 263 U. S. 78, the United States Government was engaged in an irrigation project in the State of Idaho. It appeared that the greater part of the Town of American Falls would be flooded and Congress authorized the Commissioners having the matter in charge to acquire, by purchase or condemnation, land for another town site, to plat it in blocks and lots, to construct and improve streets, alleys, sewers, water mains, and all other usual city facilities, and to exchange lots in the new town site for lots in the old town site. It was there contended, as plaintiff contends here, that the taking of land for the new town site was

not a taking of land for the irrigation project, or for irrigation purposes. Plaintiff, in his brief, there contended that:

> "In condemning this land the Government does not desire to retain it, but to dispose of it, and this disposition by the public is not, and cannot be, a public use. No agent or instrumentality of the Government intends or proposes to use the land in question."

But Chief Justice Taft, who wrote the opinion of the Court, answered the plaintiff's argument as follows:

> "No one would say that a legislative act authorizing a railway company to build a railroad exceeds the constitutional limit by reason of a specific provision that the company may condemn land not only for the right of way, but also additional land adjacent thereto for use as borrow pits in making fills and embankments, or for use as spoil banks or dumps for the earth excavated from tunnels and cuts. *Such adjacent land would certainly be devoted to the public use for which the railway was being constructed.* If so, then the purchase of a town site on which to put the people and buildings of a town that have to be ousted to make the bed of a reservoir would seem to be equally within the constitutional warrant. *The purchase of a site to which the buildings of a town can be moved and salvaged, and the dispossessed owners be given lots in exchange for their old ones, is a reasonable adaptation of proper means toward the end of the public use to which the reservoir is to be devoted.*"

The ultimate intended railroad use of the property to be acquired is only incidental to the primary public highway use. If plaintiff's argument is sound then, as applied to the facts in the Brown case, none of the property in the new town site could have been condemned under the statute providing for the condemnation of property for irrigation purposes but that part to be used for public streets would have been condemned under a statute providing for the condemnation of land for public street purposes; that intended to be used for fire stations would have been condemned under another statute providing for the condemnation of land for fire station purposes; that intended to be used for school purposes would have been condemned under a school condemnation law and that intended to be used for private residences or for private business purposes could not have been condemned at all.

Plaintiff argues that the matter of irrigation in Idaho is of such unusual public importance that a different rule might properly be applied in such cases, but this argument is answered by Pitznogle v. Western Md. R. R. Co., 119 Md. 673, 87 Atl. 917. In that case a Railroad Company, *as a railroad project,* undertook to straighten its right of way and to construct certain yards. It started condemnation proceedings to acquire a piece of land for track and yard purposes. Included in the land to be acquired for such purposes was land used as a private road and the description of land as set up in the condemnation proceedings included a strip of land to be exchanged with the owner of the private road which strip of land was ultimately to be used not for railroad tracks, or for a railroad yard, or for any other railroad facility, but solely as a private road in substitution for the private road required by the Rail-

road Company. If plaintiff's argument in the cases at bar is sound, then, if applied to the Pitznogle case, the Railroad Company could not have condemned the land to be used as a road, but the Court held that such land was being acquired *for railroad purposes,* and in its opinion said:

> "It is not contended by the defendants that the use of the land for railroad purposes is a private and not a public use, but they contend that the use of a part of the land for the location of a private road in substitution for the existing private road, which is to be closed and used by the plaintiff company for railroad purposes, is a private use of said land; and that inasmuch as the petition does not state or designate how much and what part of the entire parcel of land so sought to be condemned is to be used for the location of said private road, and how much and what part is to be used for railroad purposes, the whole must fall. The correctness of this contention must be conceded, should we hold, under the facts and circumstances of this case, that the use of a part of said lands for such private road or way is a private use and not a public use. But is it a private use? * * * Without the use of this road or private way for the purposes that we have mentioned, the plaintiff would be defeated in its proposed plan of straightening its road and of enlarging its yard, and to close this road without substituting for it another road or way would deprive those entitled to its use of the means of reaching the pike from their homes, and they would not be permitted to condemn a private road or way (Arnsperger v.

> Crawford, supra) in substitution for the road lost to them, resulting from its necessary use for railroad purposes, which this court has time and again said was a public, and not a private, use. * * * The condemnation of a part of this land here sought to be condemned for a substitute private road or way is incident to and results from the taking by reason of public necessity, of the existing private road for public use, *and the use of it for such purposes should, we think, be regarded as a public use within the meaning of the Constitution.*"

There is certainly nothing so extraordinary, or of such unusual public importance, in the acquiring of property to exchange for a private road desired by a railroad company to straighten its right of way, as to call for the application of any extraordinary rule of law.

In another case, Rogers v. Bradshaw, 20 John. 735, the State of New York was constructing a canal and in order to complete the project in accordance with the plans and specifications therefor it was necessary to take part of a turnpike belonging to a private corporation. We can conceive of no difference between that case and the case at bar, where the State of Michigan is engaged in the improvement of a public highway and in order to complete the project in accordance with the State's plans and specifications it is necessary to take the Railway Company's right of way. In that case, as in this, the State acquired other land, by condemnation, to substitute for the privately owned turnpike, and the Court, in its opinion, said:

> "It was shown in proof, that the route of the

northern canal, at the place in question, was directed by the chief engineer; that the turnpike road adjoining the place where the trespass was alleged to have been committed was unavoidably encroached on by the tract or course of the canal, and that another road was indispensable at that place, and must have been made before the canal was commenced.

Here the question occurs: Were not the Commissioners authorized, by this act, to enter upon the land of the defendant in error, and to use it to the extent and in the manner stated in the record. The Supreme Court have answered the question in the negative, because they say the entry was not for the prosecution of the canal improvements, but to make a substitute for part of the turnpike road, which was broken up and taken for the canal. But if the turnpike road was unavoidably encroached on by the canal, and another road was indispensable at that place, before the canal was commenced, and the land taken was necessary for the road (and all this was proved in the cause), it would seem to follow, as a clear and logical deduction, that *the land taken was necessary for the prosecution of the improvements intended by the act.* It is very certain, according to the testimony, that the improvement of the canal, at the place specified, could not be prosecuted without the road; and if so, *the road was necessary for the improvement.* Besides, the commissioners were made the judges as to what lands were necessary for the prosecution of the improvements.

Upon the very straitened construction set up,

on the part of the defendant in error, it might truly be said that if the course of the canal met a house, or barn, or barrack, or shed, standing in its way, it could not be removed to the right hand or to the left, and placed upon the adjoining land, of the same owner, without committing a trespass upon that land. It might just as well be said, in such case, as it has been said in this, that the new ground taken for the occupation of the building, was not taken for any purpose immediately connected with the canal, but as a substitute for the site of a house or barn, which was broken up and taken for the canal."

In each of the above cases the condemnation proceedings were instituted and carried through to a conclusion under statutes enacted by the legislatures of the respective states providing for the condemnation of lands for the primary purposes for which such lands were to be devoted, that is, in the Brown case the lands condemned for a new town site were acquired under statutes of the State of Idaho providing for the condemning of lands for irrigation purposes. In the Pitznogle case the land condemned by the railroad company to substitute for a private road, required by the railroad company for its relocated line of railroad and yards, was acquired under statutes of the State of Maryland providing for the condemning of lands for railroad purposes, and in the Rogers case the lands condemned to substitute for the privately owned turnpike were acquired under statutes of the State of New York providing for the condemning of land for canal purposes.

We have not been able to find one single case, and in all of the litigation that has been had since the

Woodward avenue widening project was commenced not one single case has been called to our attention, or to the attention of any court, contrary to the Brown, Pitznogle and Rogers cases above referred to, and we submit that on the authority of said cases this Court should hold that plaintiff's lands and property rights, if any, are necessary for the public highway improvement, i. e., the widening of Woodward avenue; that they will be devoted to the use for which said Woodward avenue is being improved; that the acquisition thereof by condemnation is a reasonable adaptation of proper means toward the end of the public use to which said Woodward avenue is being improved and that such public use is a public highway use.

B. Plaintiff's lands may be acquired by the State Highway Commissioner under, and in accordance with, the General Highway Condemnation Laws of the State of Michigan without violating any of the provisions of the Constitution of the United States.

We have shown above that plaintiff's lands are being taken for a public highway purpose. Under the authority of Brown v. U. S., 263 U. S. 78; Pitznogle v. Western Md. R. R. Co., 119 Md. 673, 87 Atl. 917, and Rogers v. Bradshaw, 20 Johnson (N. Y.) 735, such lands and claimed property rights may be acquired under any statutes of the State of Michigan which provide for the condemnation of lands for public highway purposes. This would be true even though Act. No. 340 of the Public Acts of 1927 of the State of Michigan, the Act authorizing the contract between the State and the Railway Company, contained no reference whatever to the acquisition, by purchase or condemnation, of the

lands needed for the new right of way. Said Act No. 340 of the Public Acts of 1927 does, however, contain such a reference. Section 4 of said Act is as follows:

> "The changes and improvements contemplated by this Act and said proposed contract, and the taking of the lands described in said contract for the new right of way of said railroad company, including the additional lands described therein necessary for depot and yard purposes at Birmingham and all other lands necessary or required to carry out this Act and said proposed contract, are hereby declared to be a public necessity, *and the State Highway Commissioner is hereby authorized and empowered to acquire the same on behalf of the State by purchase or condemnation in accordance with the general laws of the State of Michigan.*"

The General Highway Condemnation Law in force and effect at the time said Act No. 340 of the Public Acts of 1927 was passed was Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, and Act No. 215 of the Public Acts of 1925. Said Act No. 352 of the Public Acts of 1925, as amended, provides the manner by which township highway commissioners, boards of county road commissioners, and the state highway commissioner may acquire property for public highway purposes. Section 1 thereof lists a number of specific highway purposes for which the Act may be used, namely:

(a) Property for the right of way of any road to be laid out, altered or widened, or for changing the line thereof.

(b) Gravel, rock, sand, dirt, and all other materials that may be needed for the proper construction, improvement and maintenance of a road.

(c) Property deemed necessary to provide for clear vision at intersections of highways with each other or with railroads.

(d) Property deemed necessary to change the channel of water courses, natural or artificial, in order to maintain a proper alignment for any road without crossing such water course, and the riparian rights of any person, firm or corporation in or pertaining to any such water course.

(e) Land necessary to be acquired for the storage of road machinery, equipment or materials.

(f) *"Any and all other property and property rights deemed by the commissioner or commissioners having jurisdiction over a road to be necessary for the proper construction, improvement or maintenance thereof."*

Plaintiff's property is deemed necessary by the State Highway Commissioner for the proper improvement of Woodward avenue.

Section 23 of said highway condemnation statute provides that:

> "The provisions of this chapter shall be deemed to extend to, and include, the right * * * to acquire and take property desired by the commissioner or commissioners (in this case the State Highway Commissioner) to exchange for other property which in his or their opinion it is necessary to acquire for public highway purposes, whenever he or they have agreed in writing with the owner or owners of such property for such exchange."

Therefore, either under the general provisions of paragraph (f) of Section 1 of said condemnation statute, or the specific provisions of Sec. 23 of said statute, the State Highway Commissioner is authorized and empowered to acquire plaintiff's lands for the purpose described in said Act No. 340 of the Public Acts of 1927.

There is also another general law of the State of Michigan which specifically authorizes the State Highway Commissioner to condemn plaintiff's lands under the General Highway Condemnation Laws. The law referred to is Act No. 215 of the Public Acts of 1925 of the State of Michigan. Sections 1 and 2 of this Act are as follows:

> "Section 1. Whenever the line of any railroad or railway company is upon or adjacent to the right of way of a trunk line highway and such right of way, or any part thereof, is necessary to be acquired for widening, straightening, altering, or otherwise improving, such highway, the State Highway Commissioner shall be authorized to enter into negotiations with such railroad or railway company for the purchase of said right of way, or of any part thereof, and to enter into an agreement with any such railroad or railway company to exchange other designated property for such right of way, or for any part thereof, whenever such other designated property shall be acquired by him; and whenever any such agreement has been entered into, the State Highway Commissioner shall be authorized, and he is hereby empowered, to acquire such other property by purchase or condemnation, and when acquired to execute the necessary conveyances and releases thereof to such railroad or railway com-

pany for its use, and to take in exchange therefor the railroad or railway right of way, or part thereof, for such public highway purposes in accordance with such agreement.

Section 2. The procedure that is, or may be, prescribed for condemnation proceedings instituted by boards of county road commissioners or the procedure that is, or may be, provided for the condemnation by state agencies and public corporations, of private property for the use or benefit of the public, is hereby expressly made applicable to any proceedings brought by the State Highway Commissioner under the provisions of this Act."

Said Act No. 215 of the Public Acts of 1925 was passed before Act No. 352 of the Public Acts of 1925, and at that time the procedure followed by the State Highway Commissioner for the condemning of lands for public highway purposes was that by which boards of county road commissioners were authorized to acquire property for public highway purposes, namely, Sections 4357-4362, inclusive, of the Compiled Laws of 1915 of the State of Michigan. The authority of the State Highway Commissioner at that time to use the county road law for condemnation purposes was given in Section 2 (b) of Chapter 5 of Act No. 283 of the Public Acts of 1909 of the State of Michigan, as amended by Act No. 367 of the Public Acts of 1921, which provided that:

"The procedure that is, or may be, prescribed, for condemnation proceedings instituted by boards of county road commissioners, is hereby expressly made applicable to such a proceeding when brought by the State Highway Commissioner.

> Such right of purchase or condemnation shall be deemed to exist in the case of the construction or maintenance of any road built or improved solely by the State, or by the State with Federal aid, or by the State in conjunction with any municipalities of the State."

In a few instances the State Highway Commissioner had also acquired land for public highway purposes under the authority of Act No. 149 of the Public Acts of 1911 of the State of Michigan, being Sections 353 to 373, inclusive, of the Compiled Laws of 1915, entitled

> "An Act to Provide for the Condemnation by State Agencies and Public Corporations of Private Property for the Use or Benefit of the Public, and to Define the Terms 'Public Corporations,' 'State Agencies,' and 'Private Property' as used herein."

Because of the use by the State Highway Commissioner of said Act No. 149 of the Public Acts of 1911 to acquire land for public highway purposes, the said State Highway Commissioner, for such purposes, acting as a state agency, Act No. 215 of the Public Acts of 1925 was so worded as to authorize and empower the said State Highway Commissioner to use said Act No. 149 of the Public Acts of 1911 to acquire property desired by him to exchange for a right of way, or part thereof.

Plaintiff contends that because of the use of the words "public corporations" in Section 2 of said Act No. 215 of the Public Acts of 1925, the Legislature intended that in cases like the case at bar the State Highway Commissioner should use the railroad condemnation laws. There are two answers to that argu-

ment: First, the Act relates only to the acquiring of property to exchange for a right of way, or a part thereof, of a railroad company, and Section 2 expressly provides for the use of the procedure that is or may be prescribed for condemnation proceedings instituted by boards of county road commissioners. Second, the only definition of the term "public corporations" in any condemnation law of the State of Michigan is that given in Section 1 of said Act No. 149 of the Public Acts of 1911, wherein the term is defined to mean "all boards, commissions and agencies made corporations for the management and control of public business and property." This definition does not include railroad companies. Furthermore, said Act No. 215 of the Public Acts of 1925 has been interpreted by the Supreme Court of the State of Michigan as authorizing the State Highway Commissioner to use the General Highway Condemnation Law, to-wit, Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, to acquire by condemnation the lands necessary for the purposes described in Act No. 340 of the Public Acts of 1927 and the contract thereby authorized between the State and the Railway Company.

Fitzsimmons & Galvin, Inc., v. Rogers, 243 *Mich.* 649.

Johnstone v. Detroit, Grand Haven & Milwaukee Ry. Co., et al., 245 *Mich.* 65.

This is a matter of procedure that is binding upon the Federal Courts.

Thorington v. Montgomery, 147 *U. S.* 492.
Ballard v. Hunter, 204 *U. S.* 258.
Cross v. North Carolina, 132 *U. S.* 140.
Simon v. Craft, 182 *U. S.* 436.

Stevens v. Nichols, 157 *U. S.* 371.
Sawyer v. Piper, 189 *U. S.* 157.
Iowa Central R. R. Co. v. Iowa, 160 *U. S.* 393.
Rothchild v. Knight, 184 *U. S.* 334.

Appellant contends that said Act. No. 215 of the Public Acts of 1925 was passed for no other purpose except to authorize the State Highway Commissioner to use the General Highway Condemnation Law to condemn lands necessary for the new right of way. Even if this were so, it would not be objectionable under the United States Constitution, but it is not true. There are scores of places in the State of Michigan where railroads and highways are immediately adjacent and parallel to each other and the Act was passed as a general law to enable the State Highway Commissioner in any such instance to contract for the acquiring of such rights of way, or parts thereof, as might be necessary for highway purposes and to substitute therefor such additional land as might be necessary for railroad purposes. The matter of public highway construction and improvement has been in a stage of evolution for several years. Projects which a few years ago would have been considered as fantastic and unreasonable are now matters of every day consideration, and as one of the steps in the evolution of highway construction, improvement and maintenance in the State of Michiga, Act No. 215 of the Public Acts of 1925 was enacted. There are places from one end of the State to the other where the Act may be used. The fact that this happens to be the first case which has reached the courts involving the use of said Act is no reason why it should be considered as a special act. It is, in fact, a general law of the State.

C. The equal-protection-of-the-laws and due-process clauses of the Fourteenth Amendment to the United States Constitution are not being violated.

Plaintiff's counsel have argued at length that condemnation under and pursuant to Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, as authorized by said Act No. 340 of the Public Acts of 1927, and Act No. 215 of the Public Acts of 1925, is unconstitutional, in that plaintiff is denied the equal protection of the laws as prohibited by the Fourteenth Amendment to the Constitution of the United States.

We understand plaintiff's argument to be that because the procedure established in Chapter 157 of the Compiled Laws of 1915 of the State of Michigan, known as the General Railroad Law, for the condemnation of private property for railroad purposes, provides for a trial by jury, for an attorney fee, and for a general appeal and has been interpreted by the Supreme Court of Michigan as not authorizing the offsetting of benefits, as distinguished from the General Highway Condemnation Law, which provides for a determination of the necessity of the project and of taking particular property for that project by the State Highway Commissioner, for the determination of the damages to be paid as compensation for the taking of property for public highway purposes by three court commissioners appointed by a court of record, for a review by certiorari instead of by appeal, and which permits the offsetting of benefits, in cases where there are benefits, plaintiff will be denied the equal protection of the laws if his property is condemned under the highway condemnation laws instead of under

the railroad laws. As mentioned above, in Subdivision V A of this brief, plaintiff's argument in this respect is based upon a false premise, namely that his lands are being acquired for railroad purposes, whereas, as a matter of fact and of law, they are being acquired for public highway purposes. On the authority of the cases referred to and quoted from in said Subdivision V A of this brief, we might well rest our case on that one proposition, but plaintiff is obviously wrong, even though, for the sake of argument, the premise is assumed to be true.

The advantages, if any, given to property owners under the General Railroad Condemnation Law, as distinguished from the General Highway Condemnation Law, *are not rights guaranteed to them under either the State or Federal Constitutions.* The General Highway Condemnation Law does not deny to any person any right guaranteed by the Constitution.

If the objections to the offsetting of benefits is good in these cases, then the same objection could be made to the offsetting of benefits in any highway condemnation case where no special assessments for benefits are to be made on account of the project. Such an objection was made in the case of McCoy v. Union Elevated R. R. Co., 247 U. S. 354, 38 Sup. Ct. Rep. 504, the specific objections being that the condemnation proceedings denied to petitioners the equal protection of the laws and deprived them of property without due process of law, in violation of the Fourteenth Amendment. As to the objection that the proceedings denied to petitioners the equal protection of the laws, the Court merely said:

"Nothing in the record affords support for the second (this) claim."

As to the objection that the proceedings deprived petitioners of their property without due process of law, the Court said:

"We may examine proceedings in the state courts for appropriation of private property to public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right to just compensation. If the necessary result was to deprive him of property without such compensation, then due process of law was denied him, contrary to the Fourteenth Amendment. Chicago, Burlington, Etc. R. R. Co. v. Chicago, 166 U. S. 226, 246, 17 Sup. Ct. 581, 41 L. Ed. 979; Backus v. Ft. Street Union Depot Co., 169 U. S. 557, 565, 18 Sup. Ct. 445, 42 L. Ed. 853; Fayerweather v. Ritch, 195 U. S. 276, 298, 25 Sup. Ct. 58, 49 L. Ed. 193. Our concern is not to ascertain whether the rule adopted by the state is the one best supported by reason or authority nor with mere errors in course of trial, but with denial of a fundamental right. Appleby v. Buffalo, 221 U. S. 524, 532, 31 Sup. Ct. 699, 55 L. Ed. 838. And see McGovern v. N. Y., 229 U. S. 363, 371, 33 Sup. Ct. 876, 57 L. Ed. 1228, 46 L. R. A. (N. S.) 391. And here it must be noted that the claim is for damages to property not actually taken from the owner's dominion.

* * * *

"The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall

not be deprived of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation. *There is no guaranty that he shall derive a positive pecuniary advantage from a public work whenever a neighbor does.* It is almost universally held that in arriving at the amount of damage to property not taken allowance should be made for peculiar and individual benefits conferred upon it; compensation to the owner in that form is permissible, and we are unable to say that he suffers deprivation of any fundamental right when a state goes one step further and permits consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages. In such case the owner really loses nothing which he had before; and it may be said with reason there has been no real injury.

"This subject was much discussed in Bauman v. Ross, 167 U. S. 548, 574, 584, 17 Sup. Ct. 966, 976, 42 L. Ed. 270. Through Mr. Justice Gray we there said: 'The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public. Consequently, when part only of a parcel of land is taken for a highway the value of that part is not the sole measure of the compensation or damages to be paid to

the ower; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened. * * * The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied; and it is therefore within the authority of Congress, in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits capable of present estimate and reasonable computation, caused by the establishment of a highway to the part not taken.' "

The syllabus to the McCoy case, supra, reads, in part, as follows:

"The owner of realty injured by the construc-

> tion and operation of an elevated railroad was not deprived of his property without due process of law in violation of the Fourteenth Amendment because benefits resulting from the increased travel were considered in determining whether the premises had been damaged, though other lands in the neighborhood were similarly benefited, for the right guaranteed is merely that the owner shall not be deprived of the market value of his property, under a rule of law making it impossible for him to obtain just compensation, and there is no guaranty that he shall derive a positive pecuniary advantage from a public work whenever a neighbor does."

In the case of Joslin Mfg. Co. v. City of Providence, 262 U. S. 668, 43 Sup. Ct. Rep. 684, the Court had under consideration the laws of Rhode Island, 1915, C. 1278, providing for condemnation of water rights and other property for the purpose of a water supply for the City of Providence. Suits were brought in equity by several plaintiffs to enjoin the City from taking possession of, or interfering with, their property. The Court, in its opinion, said:

> "The Act, it is asserted, denies the equal protection of the laws, among other things, by permitting the owner of a business established prior to the passage of the Act to recover for injury thereto while withholding such compensation from one whose business has been established since, and by allowing a mill owner to recover the cost of removing his machinery to a new location within the New England States, while denying a similar right to one desiring to move

to a location elsewhere. It is further asserted by plaintiffs in error, in their capacity as taxpayers, that the effect of allowing these and other consequential damages is to deprive them of their property without due process of law.

Injury to a business carried on upon lands taken for public use, it is generally held, does not constitute an element of just compensation (Cox v. Philadelphia, etc., R. R. Co., 215 Pa. 506, 64 Atl. 729, 114 Am. St. Rep. 979; 2 Lewis on Eminent Domain, 3rd Ed. Sec. 1727) in the absence of a statute expressly allowing it. Whiting v. Commonwealth, 196 Mass. 468, 82 N. E. 670; Oakland v. Pacific Coast Lbr. Co., 171 Cal. 392, 398, 153 Pac. 705). *This statute, therefore, does not deny a right, it grants one,* and limits it to a business already established. We cannot say that such a classification is unreasonable or arbitrary—and certainly it is not clearly so.

* * * *

In respect of the contention that the statute extends the right to recover compensation, so as to include these and other forms of consequential damages, and thus deprives plaintiffs in error, as taxpayers of the City, of their property without due process of law, we need say no more than that, while the Legislature was powerless to *diminish* the constitutional measure of just compensation, we are aware of no rule which stands in the way of an *extension* of it, within the limits of equity and justice, *so as to include rights otherwise excluded.* As stated by the Supreme Judicial Court of Massachusetts, in Earle

v. Commonwealth, 180 Mass. 579, 583, 63 N. E. 10 (57 L. R. A. 292, 91 Am. St. Rep. 326), speaking through Mr. Justice Holmes, who was then a member of that Court: 'Very likely the * * rights were of a kind that might have been damaged if not destroyed without the constitutional necessity of compensation. But some latitude is allowed to the Legislature. It is not forbidden to be just in some cases where it is not required to be by the letter of paramount law.' "

The most that can be argued for plaintiff is that it is not just or equitable to offset benefits against the damages that would otherwise be payable as compensation for the taking of portions of his property, but this is an argument to be addressed to the Legislature and not to the courts, and the fact that the Legislature has seen fit in the railroad condemnation law not to authorize the offsetting of benefits does not mean that the plaintiff, or others similarly situated, have been, or will be, denied any fundamental right. *The railroad condemnation laws merely grant to property owners certain privileges which they are not constitutionally entitled to.* The highway condemnation law limits property owners more nearly to their constitutional rights, but it gives to all property owners all of the rights guaranteed by the Constitution.

In the case of Backus v. Ft. Street Union Depot Co., 169 U. S. 557, 568, 18 Sup. Ct. 445, 42 L. Ed. 853, a case which arose in the State of Michigan, the Court said, in part:

"Neither was there anything in the proceedings actually had before the last jury and in the

Circuit Court which conflicts with any mandate of the Federal Constitution. Counsel say that the respondents were entitled to a trial by jury of inquest, but were forced to trial before a common law jury, presided over and controlled by the circuit judge, but the Constitution of the United States does not forbid a trial of the question of the amount of compensation before an ordinary common law jury, or require, on the other hand, that it must be before such a jury. It is within the power of the State to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial in the ordinary way; or it may provide that the question shall be settled by a sheriff's jury, as it was constituted at common law, without the presence of a trial judge. *These are questions of procedure which do not enter into or form the basis of fundamental right.* All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there if that due process of law which is required by Federal Constitution. Bauman v. Ross, 167 U. S. 548, 593."

We have pointed out above that the right of eminent domain is a right incident to sovereignty and that it exists independent of, and in fact antedates, all constitutional and statutory provisions. It is restricted only as the constitution or the statues prescribing procedure may do so. So long as the statute provides that in some appropriate way before some properly consti-

tuted tribunal inquiry shall be made as to the amou of compensation, the mandates of the Fourteen Amendment to the Federal Constitution are satisfi The determination of the amount of the damages a what shall be considered in determining such amou in each particular form of proceeding is a matter procedure and not a fundamental right. Whether ben fits shall be offset or not is a matter of procedure a not a fundamental right.

State Highway Comr. v. Breisacher, 231 *Mi* 317, 322.

In this State the General Highway Laws providi for the discontinuing and laying out of township roa (Sec. 23 of Chapter 1 of Act No. 283 of the Pub Acts of 1919; Sec. 4310, Compiled Laws of 1915, of t State of Michigan) reads, in part, as follows:

> "If any discontinued highway shall be up lands through which a new highway shall be la out, the same may be taken into considerati in estimating the damages sustained by t owner of such lands; and in like manner t benefits accruing to owners of lands by reas of laying out or altering any highway shall taken into consideration."

Until Act No. 352 of the Public Acts of 1925 beca effective, there was no provision in the county road l which authorized the considering of benefits in t determination of the damages to be paid as comp sation for the taking of property for county roa In like manner there was no authority for the St Highway Commissioner to consider benefits in c demning land for state trunk line highways when s

Act No. 352 of the Public Acts of 1925 became effective.

See:

State Highway Comr. v. Breisacher, supra.

If plaintiff's argument in regard to the offsetting of benefits against the damages which they might otherwise be entitled to is sound, then, as applied to the acquiring of land for public highway purposes in the State of Michigan, every person from whom land was taken for township road purposes before Act No. 352 of the Public Acts of 1925 became effective was denied the equal protection of the laws because benefits were offset as against him, whereas lands taken for county road purposes and state trunk line highways were taken under a procedure which did not permit offsetting of benefits.

State Highway Commissioner v. Breisacher, 231 *Mich.* 317.

After the decision of the Court in State Highway Commissioner v. Breisacher, supra, the legislature amended the law then applicable to condemnation of land by Boards of County Road Commissioners by expressly authorizing offsetting of benefits.

Act No. 191 of the Public Acts of 1925 of Michigan.

Counsel for appellant has referred to the recent case of in re Widening of Bagley Avenue, 248 Mich. 1, as authority for the proposition that benefits cannot be deducted in a street widening case. The situation there was entirely different than in the case at bar, in that the street widening project involved in that case was in the

City of Detroit, which, under its charter, forms special assessment districts to defray the cost or a part thereof, of street widening projects. In such cases benefits cannot be offset because to do so would be equivalent to charging a land owner, from whom a parcel is taken, twice for the same benefit. This is fully explained in the case of City of Detroit vs. Loula, 227 Mich. 191. The Bagley Avenue Widening case, therefore, has no application whatever to the case at bar, where the law does not provide for the forming of a special assessment district.

Furthermore, the Railroad Condemnation Law has now been amended to specifically provide that, when land is being taken by a railroad company for railroad purposes, "benefits arising out of and created by the public purpose for which property may be taken under the provisions of this Act, accruing to the owners of land or lands, or property rights, by reason of such public use of the property taken, shall be taken into consideration in determining the damages to be paid to any such owner as compensation for the taking of his property for any such public purpose."

Act 140 of the Public Acts of 1929 of Michigan.

We, therefore, respectfully submit that there is no merit in appellant's contention that the proceedings in question deny to him the equal protection of the laws, or that his property is being taken without due process of law.

D. Act No. 340 of the Public Acts of 1927 does not constitute an arbitrary, unreasonable classification.

In 6 R. C. L. 384, it is said:

> "In the exercise of its power to make classifications for the purpose of enacting laws over matters within its jurisdiction, the state is recognized as enjoying a wide range of discretion. *The question of classification is primarily for the Legislature, and it can never become a judicial question except for the purpose of determining, in any given situation, whether the legislative action is clearly unreasonable.*"

In 6 R. C. L. 380, it is said:

> "But if the classification is not wholly unreasonable and arbitrary, so that the statute is uniform in its operation on all the members of the class to which it is made applicable, no one is denied the equal protection of the laws guaranteed by the Federal Constitution. *It has been said that it will be upheld unless it is so manifestly inequitable and unjust that it will cause an imposition of burdens on one class to the exclusion of another without reasonable distinction.*"

And in 6 R. C. L. 385, it is said:

> "Before a court can interfere with the legislative judgment, it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. *When the classification in a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.*"

Attention is again called to the case of Joslin Mfg. Co. vs. City of Providence, 262 U. S. 668, 43 Sup. Ct. Rep. 684, wherein the act of the legislature was attacked because it permitted the owner of a business established prior to the passage of the act to recover for injury thereto while withholding such compensation from one whose business had been established since and because it allowed a mill owner to recover the cost of removing his machinery to a new location within the New England States while denying a similar right to one desiring to move to a location elsewhere. The plaintiffs in that case claimed that because of these provisions of the act they were deprived of the equal protection of the laws, but the Court said:

> "We cannot say that such a classification is unreasonable or arbitrary—and certainly it is not clearly so. * * * The Legislature evidently found a sufficient and proper basis for classification and we are not prepared to say that its conclusion was so palpably arbitrary as to fall within the provisions of the Fourteenth Amendment. See Ark. Natural Gas Co. vs. Ark. R. R. Comm., 261 U. S. 379, 43 Sup. Ct. 387, 67 L. Ed., March 19, 1923, and cases cited."

Act No. 215 of the Public Acts of 1925 is a general law of the state. There are innumerable instances in the State of Michigan where its provisions may be made use of. In such cases, as in the case at bar, the proceedings will require an expenditure of public moneys for public highway purposes. The Act contemplates a procedure in which a railroad company is not the moving party; a procedure in which the public is the party primarily interested; a proceeding in which the public interest is for a highway improve-

ment, and a procedure which presumably would never be commenced by the railroad company to acquire a new right of way upon which to relocate its railroad, it being a matter of public highway concern, initiated by the State, through its agent, the State Highway Commissioner, for the purpose of improving a public highway to relieve highway traffic congestion and provide for the safety, convenience and general welfare of the public traveling upon the public highways and not for any railroad improvement. It is clearly not an unreasonable classification. We submit that, on the contrary, it is a logical and proper classification and that the courts should so find.

We submit, therefore, that plaintiff's lands, or, in the Walton case, claimed property rights, may be acquired by the State Highway Commissioner under, and in accordance with, the General Highway Condemnation Laws of the State of Michigan without violating the Equal-Protection-of-the-Laws Clause of the Federal Constitution or any other constitutional right, and that there has not been and there is not now any threatened unconstitutional invasion of any fundamental rights.

VI.

Plaintiff Has an Adequate Remedy at Law.

Proceedings were commenced by the State Highway Commissioner in April, 1928, to acquire portions of the plaintiff's lands and property rights for the new right of way. A hearing on the question of necessity was held, at which the appellant was present.

A determination of necessity was made following the

hearing in April, 1928. If the plaintiff considered that said proceedings violated any of his constitutional rights he had a remedy at law at that time, i. e., a review in the Supreme Court of the State of Michigan by certiorari, and if the Supreme Court of the State of Michigan should have decided adversely to his contentions he could then have reviewed that decision in the Supreme Court of the United States. The plaintiff did file a petition for certiorari in the Supreme Court of the State of Michigan, in which he raised substantially the same constitutional questions as are raised here, but later withdrew the petition. He had the right to a review at that time, *before possession was taken.* The fact that he did not pursue that remedy is not material. The material part is that he had the remedy and permitted the State Highway Commissioner to take possession of the property and do certain work thereon preparatory to actual grading for the new right of way.

On the question of the proper rule of damages to be applied (and we submit that this is the plaintiff's real objection to the proceeding), he has an adequate remedy at law. The proceedings before the Probate Court for Oakland County, Michigan, restrained by the lower Court's order on the petition of the plaintiff, was a proceeding instituted by petition of the State Highway Commissioner for the appointment of three court commissioners to hear the parties, view the premises and determine the damages to be paid as compensation. If the State Highway Commissioner is permitted to proceed, plaintiff will have an opportunity to be fully heard before the court commissioners. If the court commissioners determine the amount of damages to be paid as compensation upon an erroneous theory

of the law, or on a basis claimed by plaintiff to be contrary to law, or to be violative of the Federal Constitution, he may have that determination reviewed in the Supreme Court of the State of Michigan by certiorari, and if plaintiff is dissatisfied with the opinion of the Supreme Court of the State of Michigan on any constitutional question he may have that decision reviewed in the United States Supreme Court.

His remedy, therefore, is full, adequate and complete and there is no occasion for the intervention of a court of equity. His argument that the State Highway Commissioner has already taken possession and has already damaged his property, and that for such damage he can sue neither the State nor the Railway Company in an action at law, is not an answer to our contention in this respect because plaintiff could have raised his constitutional objection at the hearing on the question of necessity and, upon filing his application for a writ of certiorari, could have obtained a restraining order from the Supreme Court of the State of Michigan, which is exactly what was done in the case of Fitzsimmons & Galvin, Inc. vs. Rogers, 243 Mich. 649. *The remedy at law existed, and does exist, and if plaintiff has suffered any damage it is because of his own laches.*

VII.

The Highway Condemnation Law Is Not Unconstitutional in Authorizing Possession to Be Taken Before the Damages Are Determined.

It is also argued in appellant's brief that the provisions of Section 6 of the highway condemnation law, which authorizes the State Highway Commissioner to take possession before the damages are determined, is

unconstitutional. In this connection, it should be borne in mind that the State Highway Commissioner has made a determination of the damages which, in his opinion, should be paid as compensation for the taking of the plaintiff's property. The amount so determined by him was tendered to the plaintiff and the tender was refused. It was thereupon deposited with the State Treasurer to secure to the plaintiff his just compensation. The same argument was made in Backus vs. Fort St. Union Depot Co., 169 U. S. 563, but the Court disposed of the argument as follows:

> "The argument is that the property owner has a constitutional right to have the amount of his compensation finally determined and paid before yielding possession; that the party seeking condemnation (in this case the Depot Company) cannot be let into possession until after all question as to the compensation has been finally settled, and the amount thereof paid; that it cannot take advantage of one report or verdict, pay the sum fixed by it, obtain possession, and still litigate the question of amount; that if it does then pay and take possession its right to further litigate is ended. But the Supreme Court of the state held against this contention, and we must assume therefrom that it is not warranted by the Constitution and statutes of the state. Indeed, the language of that Constitution is, 'made or secured.' Does this amount to a denial of the right to that protection to property which is guaranteed by the Fourteenth Amendment to the Federal Constitution? In other words, is it beyond the power of a state to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and

payment thereof? This question is fully answered by the opinions of this court in Cherokee Nation vs. Southern Kansas Railway, 135 U. S. 641, and Sweet vs. Rachel, 159 U. S. 380. *There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof.*

Neither can it be said that there is any fundamental right secured by the Constitution of the United States to have the questions of compensation and necessity both passed upon by one and the same jury. In many states the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the Legislature, or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of a judicial character, but rather one for determination by the lawmaking branch of the government. Mississippi & Rum River Boom Co. vs. Patterson, 98 U. S. 402, 405; U. S. vs. Jones, 109 U. S. 513; Cherokee Nation vs. Southern Kansas Railway Company, supra.

Neither was there anything in the proceedings actually had before the last jury and in the circuit court which conflicts with any mandate of the Federal Constitution. Counsel say that the respondents were entitled to a trial by a jury of inquest, but were forced to trial before a common-law jury, presided over and controlled by the circuit judge. But the Constitution of the United States does not forbid a trial of the question of

> the amount of compensation before an ordinary common-law jury, or require, on the other hand, that it must be before such a jury. *It is within the power of the state to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial in the ordinary way;* or it may provide that the question shall be settled by a sheriff's jury, as it was constituted at common-law, without the presence of a trial judge. *These are questions of procedure which do not enter into or form the basis of fundamental right.* All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by Federal Constitution.—Bauman vs. Ross, 167 U. S. 548, 593."

And in the case of Rindge Co. vs. Los Angeles Co., 262 U. S. 700, which involved the constitutionality of a highway condemnation law substantially the same as Act No. 352 of the Public Acts of 1925 of the State of Michigan, the Court said:

> "2. Public necessity for the taking. We necessarily accept, as a matter of state law, the holding of the district court of appeal that the proviso to paragraph 1241 of the Code made the resolutions of the board of supervisors conclusive evidence as to the necessity of taking these particular highways and the other matters therein specified. So construed it was held by that court not to be objectionable to any provision of the state or Federal Constitutions. *By this we are controlled so far as the provisions* (709) *of the*

state Constitution are concerned. Fallbrook Irrig. Dist. vs. Bradley, supra, p. 155; Georgia R. & P. Co. vs. Decatur (265 U. S. 432, ante, 1065, 43 Sup. Ct. Rep. 613). And, so construed, this statute is *not in conflict with the Fourteenth Amendment,* either because it fails to provide for a hearing by the landowners before such resolution is adopted, or otherwise. *The necessity for appropriating private property for public use is not a judicial question.* This power resides in the Legislature, and may either be exercised by the Legislature *or delegated by it to public officers.* 'Where intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.' Bragg vs. Weaver, 251 U. S. 57, 58, 64 L. Ed. 135, 136, 40 Sup. Ct. Rep. 62. 'That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. Neither is it any longer open to question in this court that the legislature may confer upon a municipality the authority to determine such necessity for itself. *The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.*' Joslin Mfg. Co. vs. Providence, decided today (262 U. S. 668, ante, 1167, 43 Sup. Ct. Rep. 684)."

Plaintiff's argument as to the desirability of such a law should more appropriately be directed to the Legislature than to the courts. It is purely a legislative question.

It is also claimed that the declaration in Section 4 o
Act No. 340 of the Public Acts of 1927 that—

> "the changes and improvements contemplated b
> this Act and the said proposed contract, and th
> taking of the lands described in said contract, fo
> the new right of way of said railroad company
> including the additional land described therei
> necessary for depot and yard purposes at Bir
> mingham, and all other lands necessary or re
> quired to carry out this Act, and said propose
> contract, are hereby declared to be a publi
> necessity, * * *"

violates Sections 1 and 2 of Article 13 of the Constitu
tion of the State of Michigan. The Supreme Court o
the State of Michigan has held otherwise.

> *Ziegel vs. Genessee Co. Board of Road Comrs*
> 241 *Mich.* 161.

The holding of the Michigan Supreme Court in thi
respect is controlling on the Federal Court.

> *Rindge Co. vs. Los Angeles Co.*, 262 *U. S.* 70

We have already discussed, and will not here repea
the proposition that the right of trial by jury, as di
tinguished from a determination by court commissio
ers, the right of a general appeal as distinguished fro
review by certiorari, and other claimed advantag
of the General Railroad Condemnation Law of t
State of Michigan over the General Highway Conde
nation Law, are not rights guaranteed to proper
owners under the Fourteenth Amendment, but are mer
extra considerations granted by the Legislature with
its discretion. The General Highway Condemnati
Law, as applied to plaintiff's case, does not deprive t

plaintiff of any fundamental rights, privileges or immunities but merely means that plaintiff will not be permitted to make as much of a monetary profit out of the proposed improvement as he would otherwise hope to get.

VIII.

There Is No Relationship of Principal and Agent Between the State and the Railway Company in This Proceeding.

A large part of appellant's brief is taken up with a discussion based upon a presumption that the State, in the acquiring of land for the new right of way, is acting as an agent of the Railway Company. Nothing could be further from the truth. We have already shown to the Court that the entire project, as described in Act No. 340 of the Public Acts of 1927, is a State project, initiated by the State, and that the only way that the Railway Company enters into the matter at all is because the State succeeded in negotiating a contract with the Railway Company by which the Railway Company agreed to convey to the State its present right of way in order to enable the State to complete its highway improvement project, after the State, as a State project, has acquired and equipped a new right of way so that the Railway Company can perform its functions as a common carrier. The appellant then argues that the State and the Railway Company are joint adventurers. What has already been said answers this argument.

SUMMARY.

In conclusion, we submit:

1. That the order dismissing appellant's bill of com plaint was properly entered.

2. That Act No. 340 of the Public Acts of 1927 o Michigan and the Contract between the State of Mich igan and Detroit, Grand Haven and Milwaukee Railwa Company therein authorized do not place appellant i an arbitrary, discriminate or unreasonable class, but that, on the contrary, it authorizes the taking of appel lant's property by the State Highway Commissione for public highway purposes, and, in making applicabl the General Highway Condemnation Laws of Michigan it accords the appellant all of his constitutional right and privileges; it does not in any way deny to him th equal protection of the laws and it does not deprive hi of his property without due process of law.

3. That Act No. 215 of the Public Acts of 1925 is general law and does not deprive plaintiff of any of hi constitutional rights or privileges and the application o its provisions does not deny to plaintiff the equal pro tection of the laws or deprive him of his propert without due process of law.

4. That Act No. 352 of the Public Acts of 1925, a amended by Act No. 92 of the Public Acts of 1927, a applied to the taking of appellant's property for th public highway purpose described in Act No. 340 o the Public Acts of 1927, does not deprive plaintiff o any of his constitutional rights or privileges; it doe not deny to him the equal protection of the laws o deprive him of his property without due process of la

5. That the question of necessity has been properly determined in accordance with the applicable laws of the State of Michigan; it is not a judicial question and is not involved in this case.

6. That appellant has an adequate remedy at law.

We, therefore, respectfully submit that the decree vacating and setting aside the restraining order previously issued herein and dismissing the bill of complaint should be affirmed.

Respectfully submitted,

FREDERIC T. HARWARD,
H. V. SPIKE,
Attorneys for Detorit, Grand Haven and Milwaukee Railway Company, and H. W. Nelson Company,
Appellees,
400 E. Jefferson Avenue,
Detroit, Michigan.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1929

No. 338

FRANK H. DOHANY,
Plaintiff and Appellant,
v.
FRANK F. ROGERS, et al,
Defendants and Appellees.

REPLY BRIEF FOR DEFENDANT, FRANK F. ROGERS

WILBER M. BRUCKER,
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KIT F. CLARDY,
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Attorneys for Defendant,
FRANK F. ROGERS.

Business Address:
Capitol,
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FRANKLIN DENLINGER COMPANY, PRINTERS AND BINDERS, LANSING

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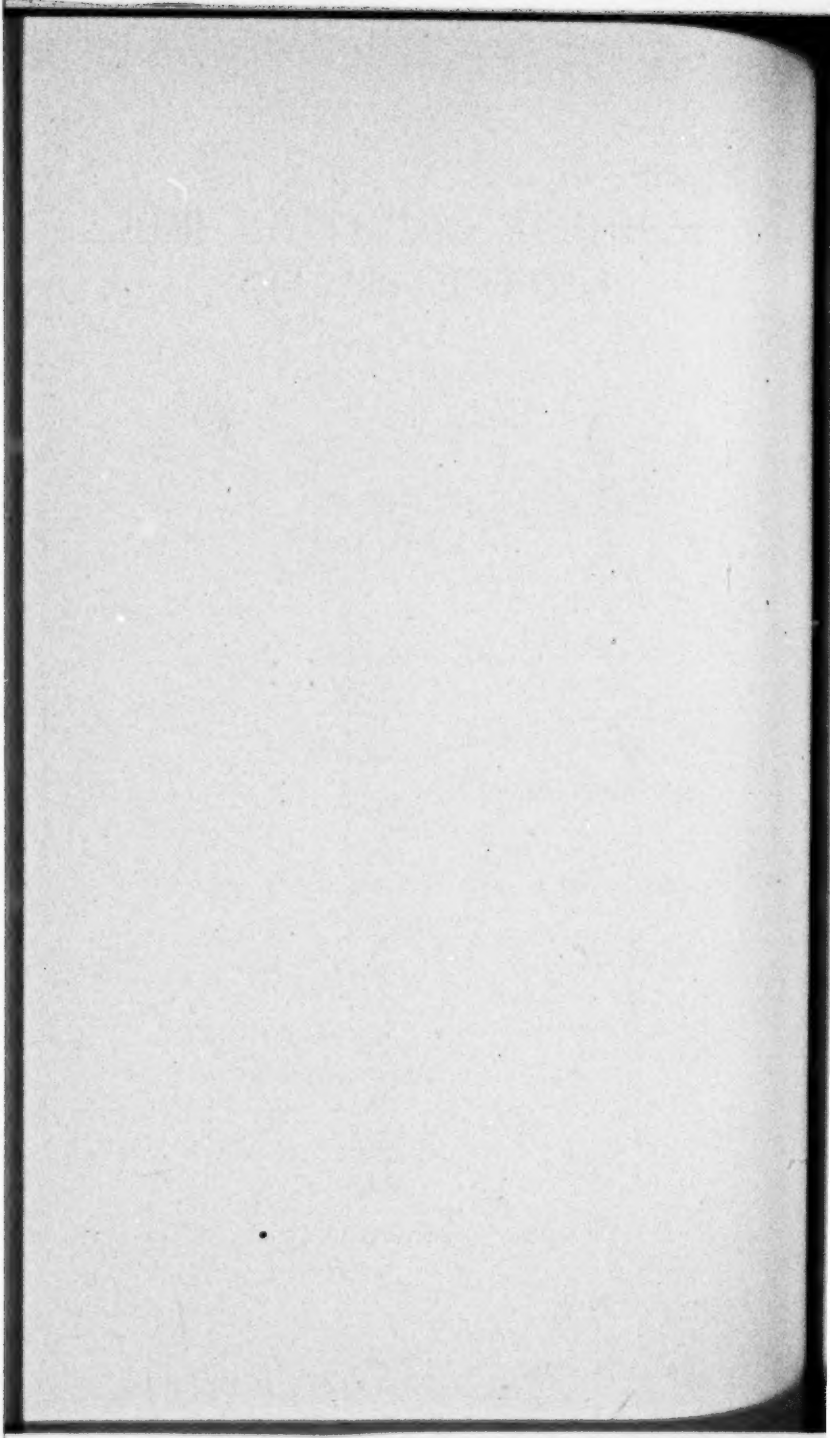


SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

1929

No. 338

FRANK H. DOHANY,
Plaintiff and Appellant,

vs.

FRANK F. ROGERS, State Highway Commissioner of the State of Michigan; THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, a Michigan Corporation, and THE H. W. NELSON COMPANY, of Chicago, Illinois, a foreign corporation,
Defendants and Appellees.

REPLY BRIEF FOR DEFENDANT FRANK F. ROGERS

The appellant was granted permission to file a reply brief. We did not assume that any further word would be required from the State of Michigan. Certain misstatements in the appellant's reply brief however should not be allowed to go unchallenged.

On page three of his reply brief the appellant sets out what purports to be a copy of certain portions of the State Highway Commissioner's determination of necessity. He then proceeds to argue that that part of the determination which he quotes establishes that the Highway Commissioner off-set benefits in making his estimate of damages. The appellant says:

> "Not only do we find the State Highway Commissioner deducted benefits when determining the damages which in his opinion should be paid to appellant for the taking of his property, * * *"

On page four his brief reads:

> "So here we find, notwithstanding the reply of Mr. Clardy to the interrogations of this court that the State Highway Commissioner did deduct benefits from the damages which in his opinion should be paid to appellant * * *"

The appellant in making these statements has, it will be observed, based his argument entirely upon an assumption which he makes from the language used by the State Highway Commissioner in naming the amount of damages which he believed this appellant should receive. *In making this assumption and in presenting this argument to the court, the appellant has apparently deliberately withheld from the court information set up in the commissioner's determination of necessity, which directly contradicts his statement and argument. He has quoted only part of the commissioner's determination of necessity and has omitted a statement which directly contradicts all the argument he has builded upon this omission.* The State Highway Commissioner's determination of necessity was produced before the lower court in full. In compiling the record

naturally only certain parts were taken out by the appellant for the sake of shortening the record. We did not deem it advisable to include any further portion because we felt sure that there would be no misrepresentation arising out of any omission. This document is required to be and is in fact officially on file in the office of the register of deeds for the County of Oakland, State of Michigan; in the office of the secretary of state; in the office of the state treasurer; and in the office of the state highway commissioner for the state of Michigan. A full and complete copy has been and is in the possession of the appellant. The determination after setting forth a description of the appellant's property reads as follows:

"Owner: Frank H. Dohany,
Damages: $23,562.50
Mortgagee: American State Bank, Detroit, Michigan.
No benefits deducted."

The next page in the Commissioner's determination sets forth a description of another parcel of property belonging to this appellant and involved in this proceeding and concludes as follows:

"Owner: Frank H. Dohany,
Damages: $1,137.50
No benefits deducted."

The appellant has omitted and left out the last two lines in one instance and the last line in the other in which the highway commissioner has emphatically set out that he had not deducted benefits. This determination was

made before the Supreme Court had determined that benefits could not be deducted. This finding was part of the same determination upon which an appeal was taken in the case of Fitzsimons and Galvin Inc. v. Rogers, 243 Mich. 649. It would not be of importance except for the fact that it is a misrepresentation of the actual facts as shown by the determination itself on file in the many offices mentioned above. The balance of his argument with regard to the proof we are putting in before the three commissioners appointed under the statute to fix damages is upon a parity with the argument we have just discussed. The State is not deducting benefits and has expressly requested the commissioners to not consider them in any of the testimony the State may present. We are endeavoring to comply with our court's determination in the Fitzsimons and Galvin case.

We pointed out to the court upon argument the distinction between the Johnstone case and the Fitzsimons and Galvin case. No property was being taken in the Johnstone case. There was involved only a question of the violation of certain building restrictions without there being any physical taking or even contact with the property involved. A different rule of damages would necessarily be involved.

The Michigan Supreme Court has said that the measure of damages is the same under either statute. It has ruled that the railway statute is inapplicable because of certain terms regarding action by the board of directors and various other inconsistent provisions. It has said that the highway procedure is fitted to the necessities of the case. It has held the statutes to be equal. The State therefore submits that there is no denial of

the equal protection of the laws and that the ruling of the court below should be sustained.

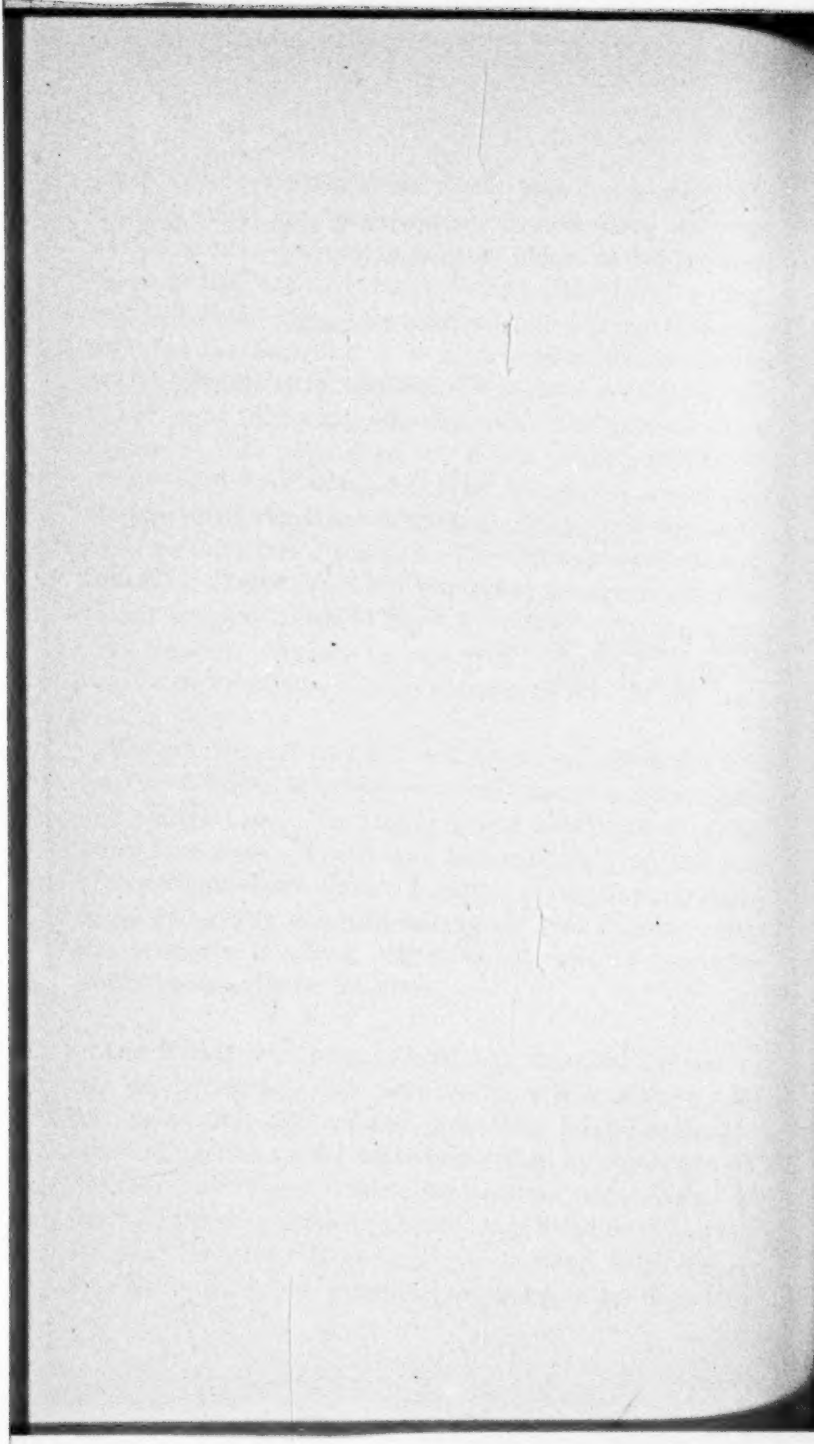
Respectfully submitted,

WILBER M. BRUCKER,
Attorney General,

KIT F. CLARDY,
Assistant Attorney General,

Attorneys for appellee, Frank F. Rogers.

Dated, Lansing, Michigan,
March 31, 1930.



SUPREME COURT OF THE UNITED STATES.

No. 338.—October Term, 1929.

Frank H. Dohany, Appellant, *vs.* Frank F. Rogers, State Highway Commissioner for the State of Michigan, et al.	Appeal from the District Court of the United States for the Eastern District of Michigan.

[April 14, 1930.]

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under § 266 of the Judicial Code from a decree of a district court of three judges, for the Eastern District of Michigan, dismissing appellant's complaint. The suit was brought to enjoin the State Highway Commissioner and others from acquiring a right of way for railway use, across land of the appellant, and from prosecuting a proceeding in the state courts for the acquisition of the right of way, by condemnation, on the ground that the state statutes under which the proceeding was had infringed the state constitution and the Fourteenth Amendment of the Federal Constitution.

The State Highway Commissioner is engaged in carrying out a project for the construction and widening of a state highway between Detroit and Pontiac, Michigan, which, for several miles, adjoins the right of way of the respondent, Detroit, Grand Haven & Milwaukee Railway Company. As a part of the project, it is proposed to include in the highway the adjacent railroad right of way. This is to be acquired by relocating the railway on lands to be taken in the pending condemnation proceedings, and exchanged for the present right of way. As authorized by No. 215 of the Michigan Public Acts of 1925 and No. 340 of the Acts of 1927, the Commissioner has entered into a contract with the railroad company for the proposed exchange, to be effected when the Commissioner has acquired, by purchase or eminent domain, the lands on which the railroad is to be relocated. Acting under No. 352 of the Mich-

igan Public Acts of 1925, as amended by No. 92 of the Acts of 1927, the Commissioner has begun, in the Probate Court of Oakland County, the proceeding which the appellant seeks to enjoin in the present suit.

In proceedings brought under the act last mentioned, commissioners appointed by the court fix the compensation for lands taken, after a hearing, and are required to assess the benefits accruing to land owners by reason of the establishment of the highway. Review may be had by certiorari. Proceedings brought by incorporated railway companies for condemnation of property for railway use, so far as relevant to the present inquiry, are governed by other statutes. Railway Condemnation Statutes, §§ 8249-8257, Michigan Comp. Laws (1915). Under them the land owner, it is contended, is accorded rights or privileges withheld from him by the Highway Condemnation Act. They are (a) the right to possession of his property until damages have been finally assessed and paid, (b) the right to consequential damages for diminution in value of any part of the tract not taken, (c) the right to damages without deduction of benefits accruing from the construction of the railroad, (d) the right to attorneys' fees and expenses in addition to damages, (e) the right to trial by jury, and (f) the right to review by appeal instead of by certiorari. Other differences are of less importance.

All questions of the propriety, under the state constitution and laws, of condemning plaintiff's land in the pending proceeding, rather than under the Railroad Condemnation Law, have been resolved in respondent's favor by the Michigan Supreme Court in other suits, which involved lands taken for the same project under the same contract and by like procedure. *Fitzsimons & Galvin, Inc.* v. *Rogers*, 243 Mich 649; *Johnstone, et al.* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 245 Mich. 65. Accepting this interpretation of the local law by the highest court of the State, *Rindge Co.* v. *Los Angeles Co.*, 262 U. S. 700, 708, we restrict our inquiry to the questions raised under the Federal Constitution.

The appellant contends that the taking of his land for the purpose of exchange with the railway company is for a private and not a public purpose (See *Missouri Pacific Ry.* v. *Nebraska*, 164 U. S. 403, 417.) and that the statute which authorizes the condemnation of his property by a proceeding under the Highway

Act, when it is to be devoted to railway use, deprives him of the special advantages named which are accorded to land owners whose property is taken under the Railway Condemnation Statutes, and so denies to him due process of law and the equal protection of the laws.

We need not inquire whether, under the peculiar provisions of the Michigan statutes, the proposed taking of appellant's land is for highway or railway purposes. It is enough that although the land is to be used as a right of way for a railroad, its acquisition is so essentially a part of the project for improving a public highway as to be for a public use. See *Brown* v. *United States*, 263 U. S. 78; *Pitznogle* v. *Western Md. R. R. Co.*, 119 Md. 673; *Rogers* v. *Bradshaw*, 20 John. 735. Nor is the requirement of the Highway Act that the appellant surrender possession of the property before payment of compensation, in itself, a denial of due process, so long as the payment of the award is insured, which is not questioned here. 20, Act No. 352 of 1925 as amended. *Backus* v. *Ft. Street Union Depot Co.*, 169 U. S. 557, 568; *Joslin Mfg. Co.* v. *City of Providence*, 262 U. S. 668; *Rindge Co.* v. *Los Angeles Co.*, *supra*. In other respects the advantages of proceeding under the Railway Condemnation Act, alleged to be withheld from appellant, fall into two classes, those which affect the measure of his recovery and those which relate to details of procedure.

The right to just compensation to which appellant is entitled under the due process clause, without regard to the particular procedure employed, is guaranteed both by the Fourteenth Amendment and Art. 13 of the Michigan constitution. We cannot assume that under the procedure prescribed by the State for the taking of appellant's land he will not be entitled to receive or will in fact be denied the just compensation which the Constitution guarantees.

On the contrary, the Supreme Court of Michigan has explicitly pointed out that the procedure and statutes presently involved not only insure just compensation in the constitutional sense but allow the full measure of compensation, for the taking, provided by the Railway Act. In addition, it is emphasized that even though the land be taken under the Highway Act, that Act, like the Railway Act, does not permit the offset of benefits arising from railroad construction against damages for the taking, since it only permits deduction of benefits derived from the construction of a highway.

Fitzsimons & Galvin Co., Inc. v. *Rogers, supra,* 664,[1] see *Johnstone, et al.* v. *Detroit, Grand Haven & Milwaukee Ry. Co., supra,* 68; *In re Widening of Bagley Avenue,* 248 Mich. 1; *In re Widening of Fulton Street,* 248 Mich. 213.

As thus construed the Michigan statutes afford no basis for anticipating that, in the pending proceeding, just compensation will be denied, or that any advantages given by the provisions of the Railway Act with respect to the amount of compensation for the land taken or the deduction of benefits will be withheld from appellant. Hence it is unnecessary to say, in response to the contention pressed upon us, how far these advantages if not secured to appellant by the Highway Act or embraced within just compensation are conferred upon him by constitutional guaranties. See *McCoy* v. *Union Elevator Railroad Co.,* 247 U. S. 354; *Bauman* v. *Ross,* 167 U. S. 548.

Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain. See *Joslin Mfg. Co.*

[1] "It is true that the highway law of this State provides that in fixing compensation the benefits accruing to the property owner are offset against the damage awarded. See Act No. 352, Pub. Acts 1925, § 18; In re Macomb County Board of County Road Com'rs, 242 Mich. 239. But it does not follow from this that in a proceeding wherein the State highway commissioner is seeking to secure a right of way, the damage to be awarded the property owner will be anything short of the 'just compensation' provided in section 2 of Art. 13 of the Constitution. In the present case, as in an ordinary proceeding for condemning a right of way for a railroad, it will be the duty of the commissioners 'to compensate the owner for what his landed interest will suffer from the use proposed to be made of it by the railroad company'. Barnes v. Railway Co., 65 Mich. 251. Adequate compensation is such only as puts the injured party in as good condition as he would have been in if the injury had not been inflicted. It includes the value of the land, or the amount to which the value of the property from which it is taken is depreciated. Grand Rapids, etc., R. Co. v. Heisel, 47 Mich. 393. There is no provision in our statutes for offsetting benefits against damages incident to taking land for a railroad right of way; and in the absence of an express statutory provision such a deduction cannot be made. Detroit, etc. R. Co. v. National Bank, 196 Mich. 660; State Highway Commissioner v. Breisacher, 231 Mich. 317. With this construction placed upon the highway act, it is not subject to the objection that it fails to provide adequate compensation for the property owner and is therefore unconstitutional. Nor does it leave force to plaintiff's contention that since it is here sought to condemn a railroad right of way the procedure must be under and in accordance with the general railroad act rather than under the highway law." Per North, J., Fitzsimons & Calvin, Inc. v. Rogers, 243 Mich. 649, 664, 665.

v. *City of Providence, supra,* 675. A state may allow the recovery of an attorney's fee in special classes of proceedings while withholding them in others. *People of Sioux City* v. *National Surety Co.,* 276 U. S. 232, 234; *C. & N. W. Ry.* v. *Nye, etc., Co.,* 260 U. S. 35; *Missouri, Kansas & Texas Ry.* v. *Cade,* 233 U. S. 642; *Farmers, etc. Ins., Co.* v. *Dobney,* 189 U. S. 301. In condemnation proceedings it may classify those whose property is taken and allow the one class expenses not granted to another. *Joslin Mfg. Co.* v. *City of Providence, supra,* 675. Since a permitted classification of those upon whom liability for attorneys' fees is imposed involves the denial of their recovery to some, appellant cannot object here to a classification allowing attorneys' fees in condemnation proceedings brought by railroad companies and denying them when brought by the state. If the classification is valid he cannot complain, if invalid, the fees denied to him under the Highway Act could not have been recovered under the Railway Act.

The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. *Reetz* v. *Michigan,* 188 U. S. 505, 508; *Hurwitz* v. *North,* 271 U. S. 40; *Bauman* v. *Ross,* 167 U. S. 548, 593; *Backus* v. *Union Depot Co., supra,* p. 569.

Nor does the equal protection clause exact uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another. That condemnation proceedings under the Highway Act are conducted on behalf of the State is in itself sufficient basis for the exercise of the legislative judgment in providing for it a different procedure from that prescribed for the exercise of eminent domain by a private corporation. See *Backus* v. *Union Depot Co., supra,* p. 570.

The decree dismissing the appellant's bill was attested by only one of the three judges who heard the case. The appellant contends that it "does not purport to be authorized or sanctioned" by either of the other two judges. The decree on its face purports to be by the District Court sitting in the cause. It recites in terms

that "the court, . . . being fully advised in the premises, do now here order, adjudge and decree . . ." and the record shows that the court referred to was made up of three judges, required by § 266. Even if, as appellant assumes, this statement by one judge is not to be relied upon, there is ample authorization and sanction for the decree in the opinion signed by two of the judges and the concurring opinion of the third. This, we think equivalent for that purpose to an announcement in open court, three judges sitting. See *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission*, 260 U. S. 212, 218.

We have considered, but do not discuss, other contentions of appellant of less moment.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.